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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 4

THE UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM R. JOHNSON

No. 5

THE UNITED STATES OF AMERICA, PETITIONER

v.

JACK SOMMERS, JAMES A. HARTIGAN, JOHN M. FLANAGAN, WILLIAM P. KELLY, AND STUART SOLOMON BROWN

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES ON REARGUMENT

Introductory.—On May 4, 1942, the Court restored this case to the docket for reargument.

Johnson and the other respondents had been found guilty under an indictment relating to Johnson's income taxes for the four years 1936–1939, inclusive. The indictment was in five counts. The

first count charged Johnson with wilful attempt to defeat and evade a large part of his income taxes for the year 1936, and charged the other defendants with aiding and abetting. The second, third, and fourth counts made similar charges with respect to the years 1937, 1938, and 1939, respectively. The fifth count charged all of the defendants together with conspiracy to defraud the United States of Johnson's taxes for the four-year period.

The judgments of conviction were reversed by the court below upon a number of grounds, primarily of a technical or procedural character. In addition, the court reviewed the evidence, and although it thought that the verdict upon the first count was not supported as to Johnson and that the verdicts upon the first four counts were not supported as to the aiders and abettors, *it did find that the evidence was sufficient to support the verdicts as to Johnson on the second, third, and fourth counts, and as to all the respondents on the fifth count.* (1 R. 193–196.) The Government's petition for certiorari, therefore, did not present any question as to the sufficiency of the evidence against Johnson on the second, third, and fourth counts, or against all the defendants on the fifth count. The respondents themselves raised that issue, and this Court's order restoring the cause to the docket has limited the reargument to the question whether the evidence supports all the verdicts on all counts. In particularizing the

issue, the order directed consideration of the following questions:

> (1) What evidence warranted submission by the trial court to the jury of the charges made as to each of the defendants (a) in each of the four substantive counts, and (b) in the conspiracy count.
>
> (2) In the circumstances of this cause, is proof of gross receipts sufficient to establish that net income resulted from the operation of any enterprise in which respondent Johnson is alleged to have been interested?
>
> (3) To sustain the sentence of respondent Johnson on the first four counts, on petitioner's "expenditure theory," must the record furnish proof that during some one of the four years referred to in those counts his expenditures exceeded reported income, and were made in part from his unreported income received in that particular year?
>
> (4) If so, does the record furnish such proof?

ARGUMENT

Preliminary analysis.—The central issue is whether the jury was reasonably justified in concluding that Johnson had received taxable income during each of the years 1936–1939, inclusive, in excess of the amounts reported by him.

The theory of the prosecution was that Johnson was the owner of a number of gambling

houses in and around Chicago from which he derived large amounts of unreported income, and that other respondents posed as the owners, thereby concealing Johnson's interest. The Government undertook to show that the various gambling houses, although ostensibly separately owned, were actually operated as a unit, thus indicating central control and ownership, and that Johnson was so identified with the houses as to prove that he was the true owner. Considerable evidence was also introduced to show the magnitude of the operations of these houses, including their currency exchange transactions which, in the circumstances of this case, furnished a reliable index of the profits of the enterprise. In addition, the Government introduced extensive evidence to prove that Johnson's cash expenditures during each of three of the four years covered by the indictment were far in excess of his available cash resources and his reported income. Thus, although the evidence on the expenditure theory could, standing alone, support the conviction of Johnson on the second, third, and fourth counts, it was far more significant when considered in the entire setting of the case. For his excessively large expenditures made reasonable the conclusion that he owned, or at least had a dominant interest in the gambling houses with which he was so closely identified. The jury could therefore reasonably attribute to

him a large portion, if not all, of the profits realized by the gambling houses.

The "ownership" and the "expenditure" theories are thus not separate and distinct branches of this case. It is erroneous, we submit, to attempt to isolate each theory, and to search the record for support of each. The correct approach is to consider them together, since each offers substantial support for the other. The fact that Johnson's expenditures exceeded his known cash resources plus reported income furnishes strong support for the conclusion that he owned the gambling houses. And the vast amount of other evidence that Johnson owned the gambling houses certainly explained the source of his large expenditures, thus making it more reasonable for the jury to conclude that he had in fact made the expenditures which he denied and over which the witnesses were at times in sharp disagreement.

The principal question in this case is whether, upon *all* the evidence in the record, the jury could be reasonably convinced that Johnson received more taxable income than he reported. The issue is not "how much" net or gross income he received, nor whether the verdicts can be sustained upon the "expenditure" theory or the "ownership" theory. The issue is simply whether the jury could find that Johnson had in fact received substantial amounts of unreported income during each of the years in question. And the jury was

entitled to take into account the entire mass of testimony pointing towards Johnson's ownership of the gambling houses; it was entitled to draw the reasonable inference that illegal operations of such magnitude would not be carried on for any substantial periods of time unless the rewards were commensurate with the risks involved; it was entitled to infer from the circumstances, set out more fully hereinafter, that the great bulk of the funds passing through the currency exchanges constituted net profits; and it was entitled to link the foregoing inferences with the large expenditures shown to have been made by Johnson.

The dominant issue, whether Johnson received more taxable income than he reported, is fully covered by Question 1 of this Court's order of May 4, 1942. We think that Questions 2, 3, and 4 in large part merely isolate several of the constituent elements of Question 1. The issue is not whether the verdicts can be sustained on any one of these elements, considered separately, nor is it necessary to establish each of those elements; rather, the issue is simply whether the jury was entitled to conclude from the entire record that Johnson had received unreported income. Accordingly, we think that all those elements should be considered as part of Question 1, and we shall endeavor, by appropriate references in our discussion of Question 1, to indicate the part they

play. However, in accordance with the Court's directions, we shall thereafter consider these elements separately and undertake to show that each of them, standing alone, will support the convictions.

I

There Was Ample Evidence to Warrant Submission to the Jury of the Charges Against Each Respondent in Each Count

At the outset of the trial it was conceded that Johnson and each of the other respondents except Brown were gamblers (2 R. 2–3). There was likewise no dispute that Johnson's income at all material times was primarily from gambling (2 R. 3, 411–412). Throughout the trial it was uncontested that at various times during the period covered by the indictment, 1936–1939, certain gambling houses were operating in and around Chicago[1] (2 R. 1–2).

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[1] The indictment specifically named some twenty-five separate houses, twenty-one of which were identified by the following names (1 R. 49):

The Horse-Shoe Club.
The Casino Club.
The Dev-Lin.
The Lincoln Tavern.
The Harlem Stables.
The House of Niles.
The D & D Club.
The Bon-Air Casino.
The Villa Moderne.
The 4020 Club.
The Southland Club.
The Western Club.
The Select Club.
The Mayfair Club.
The Northland Club.
The Club Proviso.
The 4011 Club.
2135 Lake Park Club.
The Harlem Club.
The 11901 Vincennes Club.
The 406 Club.

Johnson denied that he owned or had any interest in those houses. He asserted that his reported income was from gambling conducted by himself individually. (2 R. 3, 410.) But as will appear hereinafter, there was ample evidence before the jury to show that the various houses were not separately owned, that their history and operation proved unitary ownership, and that it was Johnson who was the owner. Conceivably, the Government might have stopped its proof at that point, for the jury would have been justified in concluding that any income of the gambling houses was income to Johnson in addition to that claimed by him to have been gained from individual operations; and the jury would plainly have been entitled to conclude that the gambling houses did receive substantial amounts of income, for the extensive character of the illegal enterprise certainly raised a strong inference that it would not long continue with its attendant hazards unless the profits were commensurate with the risks. But the Government did go further; it went much further, and undertook to show in detail the currency exchange transactions of the gambling houses which furnished cogent evidence of the amount of the profits involved. Moreover, the Government did not stop even there; it went still further and showed that Johnson's personal expenditures during at least three of the years involved (1937–1939) were far in excess of his reported income and known cash resources. From

all these circumstances, the jury was plainly warranted in determining that all the profits, or at least a major portion thereof, were chargeable to Johnson, and that they constituted unreported income.

We shall now proceed to consider the evidence in detail, not only as it relates to Johnson himself, but also as it affects each of the other respondents.

A. EVIDENCE ON THE SUBSTANTIVE COUNTS

1. *The operation of the gambling houses as a unit*

That the various gambling houses were operated as a unit was shown by compelling evidence. The detailed evidence, which will be recounted below, showed that the services furnished to the houses, including the furnishing of horse racing information, telephone, bus service, and moving of furniture and equipment were handled by single firms through single accounts. The houses were interconnected by a private telephone exchange. The original outfitting of a number of the places as gambling houses and alterations and repairs on the houses were made by the same construction crew. Busses and private cars hired by the respondents carried customers to and between the houses.

The various respondents acted as bosses or managers at houses other than the houses which they had stated they owned and were described as acting as day or night shift bosses. Employees were

interchanged among the houses. From 1936 to 1938 three of the respondents carried on the bulk of their banking business at the same currency exchange and through the same account. From 1938 through September 1939, these respondents transacted their banking business at the Lawrence Avenue Currency Exchange operated by the respondent Brown. Brown carried the business as a single account.

a. The gambling houses, their location, construction and maintenance.—Over twenty gambling houses make their appearance in the record. About six or seven recur most frequently.

The Horseshoe Club, at 4721 North Kedzie or Kedzie and Lawrence Avenues, was claimed by Sommers to have been owned by him (2 R. 467; 3 R. 810–811). *The Dee-Lin Club*, Devon and Lincoln Avenue, Tessville, was likewise stated to have been owned by Sommers (2 R. 467; 3 R. 812).

The Harlem Stables, located outside the Chicago city limits, was stated by Hartigan to be owned by him (2 R. 462). Wait testified that Hartigan also owned the *Lincoln Tavern*, on Dempster Road outside of Evanston, Illinois (3 R. 896). Sommers testified that he borrowed the use of Lincoln Tavern from Hartigan several times (3 R. 812, 833, 834).

The D & D Club, Division and Dearborn Streets, Chicago, was claimed to have been owned by Kelly (2 R. 458; 3 R. 878).

Flanagan testified that he owned the *4020 Ogden Club*, 4020 Ogden Avenue, and a second house nearby, the 2141 Club at 2141 South Pulaski Road (3 R. 931–932). Flanagan also claimed ownership of a handbook service bureau located first at 2135 South Pulaski and later at 4707 Irving Park Boulevard [2] (3 R. 931–936).

The Bon-Air Country Club, near Wheeling, Lake County, Illinois, opened as an elaborate night club in 1938 and included a gambling casino the following year. Johnson claimed that he and Skidmore were half owners of the club. Hartigan and Wait operated the gambling casino (3 R. 902, 956).

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[2] The House of Niles, Milwaukee Avenue, Niles, Illinois, and the Casino Club, 4715 Irving Park Boulevard, Chicago, were apparently identified by the defense with Mackay (2 R. 2; 3 R. 822–823, 946; cf. 2 R. 236, 330; 3 R. 569). The Southland Club, 6245 South Cottage Grove Avenue; the Western Club, 9730 Western Avenue; The Lake Park Club, 5325 Lake Park Avenue; the 119 [illegible] Vincennes Club, at that address, and some small handbooks, including the Select Club and Club Proviso, were claimed to have been owned by Creighton (3 R. 857–858).

The gambling room in the Villa Moderne, on Skokie Highway in Cook County, Illinois, was stated to be owned by Wait (3 R. 896).

Certain other small handbooks appear in the evidence such as the Crawford Club, 3946 School Street; the Mayfair Club, 4837 Elston Avenue, and 3332 Milwaukee Avenue; the 4011 Club, 4011 N. Monticello; the Northland Club, 7515 N. Clark Street; and the K & K Club, 2133 S. Kedzie (2 R. 128–129, 135, 137, 174–177, 185, 222–223, 239–240, 247–248, 248–249, 253–254, 257–258, 262, 317–318, 331, 337).

Of the principal gambling houses named, the 4020 Ogden Club and the Horseshoe apparently were in operation for a considerable period of time prior to 1936 (2 R. 293–296). The rest of the more important houses, however, were opened and began operation late in 1935 or in 1936. The principal testimony as to the construction of these houses comes from the witness Charles G. Schultz, a carpenter.

Schultz testified that in the spring of 1935 he was employed by one Roy Love and together with others did construction work on the outside of the Dev-Lin. At that time the place was simply a dance hall and had no gambling. Three or four weeks later, after the conversion, the witness saw gambling at the Dev-Lin. (2 R. 234–235.)

Thereafter, Shultz worked at the Dev-Lin as an employee for about six months and was then called to work at the House of Niles in November of 1935, where he did alterations for three days. Next, Schultz, Love, and three other men were taken to the Lincoln Tavern, which was then a roadhouse. The men made interior alterations, and after it reopened, Schultz observed gambling. (2 R. 236–237.)

In February of 1936, Love sent Schultz to work at the D & D Club. Schultz worked first alone and then with one other man in making alterations in a basement room and later, with a crew of men, made alterations in what had been an old lodge hall on the second floor. No gambling equip-

ment was in the place when Schultz went there. He worked there about four or five months. (2 R. 238.)

Beginning in the summer of 1936 Schultz and others next worked under Love on the Harlem Stables for a period of about six weeks or two months. Alterations were made in the interior and an addition was built. The place had been a tavern and contained no gambling equipment. After the work was completed, Schultz saw what looked like gambling and horse-book material there. (2 R. 238–239.)

Schultz testified that they next worked on Johnson's farm under Love's direction. There they built a house and some outbuildings and made alterations and repairs. All this work was done in 1937. (2 R. 239.)

After working on Johnson's farm, Schultz in succession did panelling at the Harlem Stables and at one of Flanagan's houses, made alterations at two other places, and finally returned to Johnson's farm for additional work (2 R. 239–240).

When Schultz finished the second time at the farm, he thereafter worked under Love about three months on the construction of a building at the Bon-Air Country Club. In 1939 Schultz again did construction work at the Bon-Air. (2 R. 240.)

Finally Schultz testified that he did some repair work at the Horseshoe, working there about two weeks under Love's orders (2 R. 241).

Three other workmen gave similar testimony of being employed by Love, of doing repairs or alterations at the same places and of being directed to work at specified places by Love. Their testimony was as to occurrences in 1937, 1938, and 1939. (2 R. 128–132, 134–135, 336–337; similarly see 2 R. 133, 310.)

The respondents' explanation of Love's activities was that he was an independent handy man, repair man, and building contractor doing business at least part of the time under the name of the Lightning Construction Company and that he was hired to work on each of their places at the recommendation of one or two of the other respondents (3 R. 810, 884, 912, 937, 962, 979). Schultz, however, testified that Love was in charge of the kitchen at the Lincoln Tavern after gambling started there (2 R. 237). An accountant who installed an accounting system at the Lincoln Tavern in December, 1935, and January of 1936 stated that Love was in charge of the dining room at the Lincoln Tavern (2 R. 305). Love arranged for the regular servicing of exhaust fans at the Horseshoe and Dev-Lin by a fan blower company (2 R. 274–275). One witness told of Love directing the moving of gambling equipment from the Horseshoe to the Lincoln Tavern, and, after similar equipment had been moved from the Lincoln Tavern to the Dev-Lin, of Love directing its installation at the latter place (2 R. 133–134; see

also 2 R. 354; cf. 2 R. 139). Three of the workmen who testified stated that between construction jobs they were employed in the actual operation of the gambling houses, Schultz running the boiler in two of them and acting as a "shill" (an employee who poses as a patron to attract customers), another as a "shill," and one first as a "shill" and later as a doorman at the Bon-Air. All of these stated that Love sent them to work at the houses in this manner. (2 R. 129–131, 135, 236–237, 240.)

Love rented a store space near the Horseshoe and used it for storage of equipment (2 R. 353; 3 R. 810). One witness described this as the place where the various employees of the gambling houses congregated to learn which of the houses were open (2 R. 353). Schultz, on being asked about the "Lightning Construction Company," said he first heard about it while working at the Bon-Air and that he thought it was a joke (2 R. 246). Love could not be found by the Government (3 R. 778–780).

b. The clearing house, its horse-racing service and telephone exchange.—During the entire period covered by the indictment the gambling houses were physically interconnected by a private telephone system (2 R. 195–208, 208–215). The exchange for this private system was located at what was described as the clearing house (2 R. 175). From prior to 1936 through August 1, 1938, the clearing house was located at 2135 South Craw-

ford Avenue, the name of the street during the period being changed to South Pulaski Road (2 R. 197–201). On August 1, 1938, the clearing house was moved to 4715 Irving Park Boulevard and continued in operation there. Telephone service was finally terminated at that address on February 7, 1940. (2 R. 200, 208–209, 214–215.) The telephone service to all of the houses from the clearing house included both one-way broadcasting service and regular two-way service (2 R. 214).

Horse-racing information was sent from the clearing house over the telephone system to the various houses (2 R. 179, 331; 3 R. 932–937). One witness described being called from the clearing house and told of certain errors in the computation of horse-racing bets at the house where he was working (2 R. 180; cf. 2 R. 330). In the making of horse-racing bets duplicate sheets recording the bets were kept in all the houses and two witnesses told of these duplicate sheets being delivered to the clearing house (2 R. 178–179, 332). Still another witness told of working in the clearing house "figuring" bets on the duplicate sheets (2 R. 256–258).

One witness described working at a gambling house in 1929 and 1930 which was connected with the clearing house and told of procuring supplies and equipment for the club by ordering them from the clearing house over the telephone system (2 R. 176). The owner of a bookmakers' supply house testified to the making of regular deliveries of

bookmakers' supplies to the clearing house during 1939. The supplies were in large quantities, but were ordered as a number of separate orders, identified by number and delivered separately wrapped. (3 R. 729–732; Govt. Exs. O–212A—O–218S.)

Flanagan testified that he was the sole owner of the clearing house which he described as a service bureau. He stated that it was simply a business for the purchase of horse racing information from the General News or Nationwide News Service and the reselling of this service in improved form to various gambling houses in Chicago. His service was described as including the taking of "lay-off" or hedging bets from the owners and "daily doubles" and he testified that this required the delivery to the clearing house of sheets recording these transactions, but not the duplicate sheets described above. (3 R. 932–937, 939–941.)

As will be later shown (*infra*, pp. 32–33), however, Flanagan's account with the Nationwide News Service was identified with Johnson (2 R. 150–159). Flanagan's description of the character of his service was inconsistent with the previously related testimony as to the checking of individual bets in the houses and the furnishing of supplies through the clearing house. Finally, Flanagan's testimony was directly impeached since he denied that a man named Morgan was ever connected with the clearing house or that a Joseph Conroy was other than a hanger-on who helped in planning the telephone hook-up. (3 R. 937, 945.) Two

local telephone managers in charge of the telephone service to the clearing house testified that all of their dealings were with a man who called himself Morgan or Vase (2 R. 204–205, 215). One of these managers identified a picture of Conroy (Govt. Ex. O–125) as being the man Morgan (2 R. 197). Conroy was shown to have been working at the clearing house (2 R. 175–176, 179–180, 373–374). He could not be found by the Government (3 R. 777–778).

c. The interchanging of managers.—Particularly cogent in showing the operation of the houses as a unit was the mass of testimony of employees of the houses and of one or more of the customers telling of the appearance of the respondents at various houses as bosses or managers and their acting as day or night shift bosses or as bosses together or in the absence of one another. This evidence had a further and equally important effect. It will be recalled that the entire defense was that the respondents Sommers, Hartigan, Flanagan, and Kelly were the sole owners of specific gambling houses—Sommers of the Horseshoe and Hey-Lin, Hartigan of the Harlem Stables and the Lincoln Tavern, Flanagan of the 4020 Ogden Club and 2141 Pulaski, and Kelly of the D & D Club. The evidence as to these respondents acting as managers at houses other than those identified with them by the defense in itself completely destroyed this defense and revealed the respondents in their true light as employees and not as owners.

Sommers.—Sommers, although claiming ownership of the Horseshoe, was described by one employee as working there as cashier in 1935 or 1936 (2 R. 133). One witness told of Sommers being his night boss at the Horseshoe in 1937, the testimony of another indicated that Sommers was the day boss at the Horseshoe in 1939 (2 R. 319–320, 322).

During the construction of the Harlem Stables gambling room in 1935 Sommers gave orders on the construction work (2 R. 235). Seven witnesses testified that Sommers was a boss at the Harlem Stables. Their testimony covered all of the years from 1936 through 1939 and included testimony as to Sommers acting there as day boss, and as doing a little of everything, floor boss, transportation boss, and all-around man (2 R. 225, 297, 316–317, 322, 346, 352, 398).[1]

When the Lincoln Tavern was opened in 1936 Sommers gave orders during the daytime (2 R. 236–237, 242). Four other witnesses stated that Sommers acted as boss at the Lincoln Tavern, including acting as day boss and as transportation boss. This was largely as to the year 1936. (2 R. 133–134, 296, 310, 316; cf. 2 R. 121.) Finally, a customer who played at most of the important

[1] Ordinary telephone service at the Harlem Stables was installed August 24, 1936, in the name of Sommers and later taken over in the name of Earl Jackson. A second change followed and on April 21, 1939, it was changed from the name of Sommers to that of Hartigan. (3 R. 698–699.)

houses gave testimony to the effect that she saw Sommers acting in a supervisory capacity at the Dey-Lin, the Lincoln Tavern, the Harlem Stables, and the Horseshoe (3 R. 567).

Hartigan.—Hartigan claimed ownership of the Harlem Stables and the Lincoln Tavern. The witness Schultz, however, who described the construction of both houses, testified that although Hartigan was at the Lincoln Tavern just after it opened, Sommers and Love and not Hartigan gave him orders. (2 R. 237, 243.) One witness, who worked at the Lincoln Tavern in 1936 and at the Harlem Stables thereafter, described Hartigan as being a floorman at both places and testified that Sommers and Kelly were at both places at the same times as Hartigan and were also acting as bosses (2 R. 296, 297–298). Similar testimony was given by two witnesses, one as to the Lincoln Tavern, the other as to the Harlem Stables (2 R. 310, 352). Two other witnesses testified respectively that Hartigan was a night boss at the Lincoln Tavern in 1936 and night boss at the Harlem Stables in 1938 (2 R. 316, 398).

Two witnesses testified that Hartigan became the boss at the Horseshoe after the death of Barnes, a former manager, in 1934, and that Hartigan continued as boss at the Horseshoe thereafter (2 R. 295–296, 309). Four witnesses directly testified, and the testimony of one other indicated, that Hartigan was the night boss at the

Horseshoe. Their testimony was as to the years 1934 or 1935, 1937 and 1939. (2 R. 316, 319–320, 326, 348, 387.) Additional testimony of a number of witnesses identified Hartigan as a boss at the Horseshoe in 1935 or 1936, 1938 and 1939 (2 R. 120, 133, 180, 226, 322; 3 R. 546).[4]

Five witnesses told of, or described incidents indicating Hartigan's acting as boss at the Dev-Lin. The years 1938 and 1939 were specifically mentioned in this testimony. One of the witnesses described Hartigan as night boss at the Dev-Lin (2 R. 262, 310, 317, 322, 387).

Hartigan was stated to have been a "box-man" at the 4020 Ogden Club in 1931 and 1932 and one of its managers during the period 1933–1935 (2 R. 184, 293–294). Again, the witness who had played at the various houses described Hartigan as acting "like a floor-walker" at the Horseshoe, the Dev-Lin, the Lincoln Tavern, and the Harlem Stables (3 R. 567).

Flanagan.—Flanagan stated that he owned the 4020 Ogden Club and 2141 Pulaski Road. There was less testimony as to his appearance at other houses but one witness testified that Flanagan acted as a boss at the Dev-Lin when the other bosses were not there (2 R. 352). Another witness described Flanagan as sitting at the entrance

[4] An ordinary telephone was installed in the Horseshoe on March 13, 1935, in the name of Hartigan. On December 20, 1938, the name of the subscriber was changed to Sommers (3 R. 699–700).

to the Lincoln Tavern gambling room and greeting people coming in (2 R. 296).

Kelly.—Kelly claimed ownership of the D & D Club which opened in 1936. Various witnesses testified, however, that Kelly was working as a "box-man" at the Horseshoe in 1935 or 1936 and at the Lincoln Tavern in 1936. (2 R. 237, 296, 310.) Another witness told of Kelly's being in charge of the wheels (roulette) at the Dev-Lin (2 R. 333–334). Five witnesses stated, or indicated, that Kelly was a boss at the Harlem Stables, their testimony covering 1937, 1938, and 1939 (2 R. 297, 318, 346, 352, 384). One witness who worked at a number of the houses told of Kelly's being his boss at the D & D, the Harlem Stables, the Horseshoe, and the Lincoln Tavern (2 R. 324).

d. The interchanging of employees.—Over forty witnesses testified that during the indictment period they had been employed in the various gambling houses. All of these witnesses told of shifting from house to house during their employment. A considerable portion of this shifting was attributable to the individual acts of the employees or to the fact that the houses were not operated all at the same time but at various times, and the employees would shift to the house or houses which were open. Part of the shifting, however, appears to have been done en masse and was made between houses which the respondents claimed were separately owned. (2 R. 225, 254–255, 297, 309, 316, 339, 346, 384–386, 391.) Twenty-one witnesses

testified of, or their testimony indicated, their being shifted from one house to another at the express direction of one of the respondents or their employees, or by direct but unidentified orders. These shifts were between houses claimed to be separately owned.

Sommers sent a driver and a "shill" from the Horseshoe to the D & D on two different occasions, the latter being transferred in 1938 when the Horseshoe closed (2 R. 297, 328; see also 2 R. 322). One witness was "recommended" by Sommers to go from the Lincoln Tavern to the Horseshoe in 1936 or 1937, from the Harlem Stables to a gambling house on 119th Street at a later date, and from the Dev-Lin to the D & D for one day's work at the latter place (2 R. 316–317). Gates, the manager of the handbook at the Horseshoe, arranged for a "service man" at the Horseshoe to get extra work at the Casino as a cashier (2 R. 178). A "shill" at the Horseshoe was told by a runner on the floor to go to the Harlem Stables (2 R. 255–256; see also 2 R. 397–398, 400).

Hartigan sent a "shill" from the Dev-Lin to the Harlem Stables in 1939. After two days there the "shill" asked the manager, one Bartel, to be returned to the Horseshoe so that he would not have as much traveling to do, and he was sent back to the Horseshoe. (2 R. 387.) A "board-man" was sent by Hartigan from the Crawford Club at 3948 School Street to the Harlem Stables in 1938 (2 R. 247). Flanagan in 1933 ordered a "shill" work-

ing at the 4020 Ogden Club to report to the Horseshoe (2 R. 295).

In 1939 when the D & D was closed, Kelly sent a "shill" to the Harlem Stables (2 R. 338). Another "shill" likewise told of being transferred between the D & D and the Harlem Stables in the same year (2 R. 325). A porter at the Lincoln Tavern transferred to the D & D Club in 1936 at Kelly's directions (2 R. 133). A witness who asked Kelly for work at the D & D Club was sent by Kelly to Hartigan at the Horseshoe and given work there (2 R. 326). A watchman who was employed at the D & D when it closed in 1938 was told by Kelly that the Harlem Stables was going to open and that he would be reemployed. When the Harlem Stables opened the witness was employed as before.[5] (2 R. 277.)

c. Miscellaneous factors showing unitary ownership and operation.—(1) Furniture and equipment were regularly interchanged between the houses and between houses asserted to be separately owned. Three employees told of helping to move gambling paraphernalia, one of moving from the Horseshoe to the Lincoln Tavern in 1936, and from the Lincoln Tavern to the Dev-Lin at a later date. Another helped move from the Harlem Stables to the House of Niles. The third helped move equipment from the Horseshoe in 1937 and

[5] For similar testimony unidentified with particular respondents see 2 R. 222–223, 250–251, 254, 318, 352, 388–390, 391–392.

went himself from the Horseshoe to the Lincoln Tavern. (2 R. 133–134, 139, 324.)

A single mover made all of the transfers of equipment between the houses. He first began this work in 1936. In testifying, he recalled moving equipment from the Horseshoe to Harlem Stables, from Harlem Stables to the Lincoln Tavern, from Lincoln Tavern to Harlem Stables, and to and from the D & D Club. On direct examination, he testified that he received the orders to move equipment from Sommers. All of the moving was carried by him in a single account under the name of the Horseshoe. On cross examination, however, he stated that he received orders for moving from Kelly and Hartigan who had been recommended by Sommers and that Sommers, Kelly, and Hartigan each paid him for the work rendered to them. (2 R. 265–271; see also 2 R. 272–273.)

Late in 1939 the mover transferred equipment from the Horseshoe and the Harlem Stables to a storage warehouse (2 R. 266, 270). An employee of the warehouse testified that after the goods arrived Sommers requested her to make out two separate warehouse receipts, covering the goods, one in his name and one in Hartigan's and to bill each of them for half of the charge. No inventory or physical separation of the goods was made, however. On three different occasions Sommers paid both of the storage bills. (2 R. 272–273, 344.)

(ii) Bus service was furnished at various times between the houses, including those claimed to be separately owned. A single bus company rendered all of this service. The operator of the bus company testified that it operated a bus from Wilson and Broadway in Chicago to the Lincoln Tavern, making a pick-up stop at the Horseshoe, from Wilson and Broadway to the Harlem Stables, with a stop at the Horseshoe, and from a place on Milwaukee Avenue to the House of Niles. The busses also ran to the Lincoln Tavern, from December 1935 to approximately May 10, 1936, about ten days in December 1936 and four or five days in June 1937 and to the Harlem Stables from February to September 1937 and in January 1939. Sommers made the arrangements for all of the bus service and paid for the service once or twice. A doorman made most of the payments. (2 R. 306–308.)

An employee at the Horseshoe stated that it had a light over the door which flashed when the bus was to leave for the Keno game at the Lincoln Tavern (2 R. 316). A driver who drove customers to and between the clubs told of the bus running to the Harlem Stables via the Horseshoe and stated that he drove his car there between bus trips (2 R. 389–390).

During most of the period covered by the indictment owners of private cars were regularly employed to drive customers from pick-up points in Chicago to the various gambling houses and

from one house to another. As with all of the other services this included transportation between houses which the respondents contended were owned and operated separately. Eight witnesses testified concerning this transportation service. They told of carrying customers between the D & D Club and the Harlem Stables, from the Horseshoe to the Harlem Stables and from 4020 Ogden to the Harlem Stables. (2 R. 249–250, 250–252, 254, 262, 297, 381–382, 388–390; 3 R. 569.)

(iii) A school was conducted near the Horseshoe where "shills" were given instruction and training to qualify them as "dealers" at a dice table. The school was attended by "shills" from the various houses and was not limited to employees of the Horseshoe. (2 R. 358, 384–385.)

(iv) From June 1936 to July 1938 banking transactions of the Horseshoe, Lincoln Tavern, D & D Club and Harlem Stables were handled at a single currency exchange, the Albany Park Currency Exchange, through a single account. The owner of the exchange testified that in June 1936 Sommers came into the exchange with some checks and made arrangements for the cashing of checks. Thereafter Sommers came in with checks to be cashed almost every day for a month. At that time Sommers brought in a man whom he introduced to the witness as Maurice Downey. Sommers told the witness that Downey would bring the checks in every day and that he, Sommers,

would guarantee all checks having Downey's initials. Sommers had previously agreed to guarantee checks cashed by him personally. (2 R. 476–477.)

Thereafter Downey regularly brought in checks and occasionally Sommers also brought some in. These were deposited by the exchange for collection and the cash given to Downey later in the same day. Downey likewise regularly brought in currency to be exchanged for new currency. (2 R. 477, 486–487, 494, 497.)

All of the checks brought by Downey or Sommers bore their initials J. S. or M. D. The checks likewise were variously initialed K. L., L. T., D. D., or H. S. When the exchange received the money for the checks, the owner divided it into separate envelopes and delivered these to Downey. The envelopes containing the cash were marked with the initials K. L., L. T., D. D., or H. S. The witness stated that by these initials he meant Kedzie and Lawrence (the Horseshoe), Lincoln Tavern, the D & D Club, and the Harlem Stables. (2 R. 477–479, 484–485, 487–488, 497.)

When checks were returned to the exchange unpaid the owner in every instance would inform Sommers. If the unpaid check was marked K. L., Sommers sent over the money to cover the check. As to checks otherwise marked, Sommers told the witness he would call and see that they were taken care of; Downey would then bring in the cash or the amount of the checks

would be deducted from incoming checks. (2 R. 497–498.)

In July 1938 all of this business was taken away from the Albany Park Currency Exchange (2 R. 477–478). Sommers at this time told the owner of the Albany Park Exchange that the respondent Brown was getting the business (2 R. 477). Brown opened the Lawrence Avenue Currency Exchange near the Albany Park Exchange in July 1938 (2 R. 478, 532). Sommers, Hartigan, and Kelly stated to revenue agents that they cashed checks at the Lawrence Avenue Exchange (2 R. 459, 463, 468). The Lawrence Avenue Exchange carried all of this business as a single account. (*Infra*, pp. 55–60.) A witness who worked in the bank room where the Lawrence Avenue Currency Exchange was located stated that she saw Sommers in the exchange almost every day while it was open but that she could not recall having seen Hartigan there (3 R. 588, 593). A similar witness on being asked if he saw persons in the court room whom he had seen in the exchange stated that he had seen Sommers there almost every day and Hartigan eight or ten times, but he did not identify Kelly (3 R. 595–596). The same witness testified that a Miss Bernice Downey, Brown's partner in the exchange, brought checks into the exchange every morning (3 R. 596–597). The Lawrence Avenue Currency Exchange closed in September 1939 (2 R. 536–537). This was approximately the same time that

the clearing house and all of the gambling houses ceased operation (2 R. 191–192, 214–215, 252, 262, 277–278, 326, 384–386, 400–401).

2. *The ownership of Johnson*

The evidence which has just been summarized was unquestionably ample to justify the jury's concluding that the important gambling houses named were not separately owned establishments but were operated and controlled under a single ownership. Indeed it is difficult to perceive how a jury could reach any other conclusion as to this phase of the case. The fact of single ownership having been established, the Government's evidence likewise identified Johnson with the houses in a number of ways and a multitude of instances which formed a most substantial basis for the jury's apparent conclusion that Johnson was the single owner.

Johnson admitted that he owned the three buildings in which the 4020 Ogden Club, 2141 South Pulaski Road, and the D & D Club were located (2 R. 411; 3 R. 950). Johnson was shown to be the owner of the building in which Brown's currency exchange, the Lawrence Avenue Currency Exchange, was located. (2 R. 56–57.) This latter building was purchased by Johnson on July 16, 1937 (2 R. 57). It was the usual one-story bank building containing safe-deposit vaults, suitable only for bank use (3 R. 587–599). Brown

pened the currency exchange there in July 1938 after Johnson purchased the building (3 R. 587, 590).

After the D & D Club opened Johnson installed an air conditioning unit at a cost of approximately $15,000. The salesman who negotiated the contract testified that he went to the D & D Club on a lead and was given permission by Kelly to survey the premises. Subsequently he discussed the matter with Johnson and Kelly at the D & D and after he submitted a bid Johnson signed the contract at the D & D. While the unit was being installed the witness saw Johnson one evening at the Horseshoe, Kelly having told him he would find Johnson there, and Johnson said that the probabilities were that air conditioning would be installed at other places. At that time Johnson mentioned a place at Irving Park and Cicero (the Casino) and another at 63rd and Cottage Grove (the Southland). (2 R. 39–45.) Kelly's "rent" at the D & D was not increased after the air conditioning was installed (2 R. 14–15, 16–19).

The construction crew working under the direction of Roy Love, which constructed many of the gambling houses in 1935 and 1936 and which did repair work at the gambling houses at various times, built several buildings and made repairs and alterations at Johnson's farm in 1937 and 1938. The same crew under Love worked in 1938 and 1939 on the construction of the Bon-Air Country

Club (2 R. 130–131, 135, 239–240, 336–337), which was shown to be owned by Johnson. (*Infra*, pp. 102–106.)

A number of witnesses testified to direct acts of ownership and control by Johnson. Of particular significance was the testimony of Lenz (2 R. 150–166), a former manager of the Nationwide News Service which furnished the clearing house with horse racing information that was in turn relayed from there to the various gambling houses. On two occasions, once in 1935 and once in 1938, when the Nationwide News Service undertook to raise its charges, Johnson appeared with Flanagan to protest against the increase. The jury was warranted in concluding from this entire line of testimony that Johnson assumed the dominant role in attempting to preserve the former rate schedules, thereby revealing his true status as owner. Moreover, Lenz testified that during the previous week he had made the following statement under oath to a Special Agent with respect to his conversations with Johnson (2 R. 157, 164–165):

> During the course of various conferences between Mr. Johnson, myself, and others at the Nationwide offices with reference to rates charged to Mr. Johnson for Nationwide News Service, Mr. Johnson argued that his rates should be lower in comparison with the rates charged to other bookmakers because customers were drawn into his places by other gambling games rather than by bookmaking activities.

And the jury was warranted in concluding from his testimony before it that Lenz reaffirmed as true that description of those conversations* (2 R. 157, 165).

An accountant testified that in December 1935 he was introduced to Johnson at the Lincoln Tavern and was asked by Johnson whether he could install a system in the dining room and bar at the Lincoln Tavern that would enable them to know whether they were making or losing money each month. The witness was instructed by Johnson to proceed to install the system. He was introduced to Roy Love who was in charge of the dining room and to Wait, and at that time Johnson told him that all

*In the respondent Johnson's prior brief in this Court (Br. 77), he contended that this statement was a mere impeaching question and under the decision in *Southern Railway* v. *Gray*, 241 U. S. 333, was not affirmative evidence of the truth of the matter asserted therein. A careful examination of the record (2 R. 150–166), however, discloses that the witness had previously given no contradictory testimony but had said simply that he did not recall any statement of Johnson's to this effect. Accordingly, he was cross-examined as to his prior statement to the Special Agent, not for the purpose of impeachment, since no impeachment would have resulted, but for the purpose of refreshing his recollection as to the subject matter of his conversations with Johnson. On being questioned as to his prior statement both by Government and defense counsel, his testimony may reasonably be construed as reaffirming the truth of the prior statement. Only the reaffirmation was before the jury, the prior statement was neither offered nor received in evidence, as such, and only the reaffirmation is now relied on. This method of refreshing the recollection of a reluctant witness was proper. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 231.

his dealings should be with Love and Wait. Thereafter the witness submitted two monthly reports to Wait. (2 R. 305–306.)

One witness testified that he had been playing dice at the Dev-Lin one evening in 1936 or 1937 when a dispute arose as to the call on "crocked" dice and he lost as a result of the call. When the witness left the table Johnson stopped him and attempted to explain what had happened; he finally said that if the witness did not consider himself fairly treated, he, Johnson, would reimburse the witness out of his own pocket. (2 R. 379–380.)

A customer at the Horseshoe testified that she complained to Sommers about the reduction of the betting limit on the game of red and black in 1938. He told her that if she wanted a higher limit she would have to consult Johnson and that she could find Johnson at the Bon-Air Country Club. The witness went out to Bon-Air and asked Johnson about the limit. Johnson told her that he would get in touch with Sommers immediately and have the limit restored. (3 R. 566–567, 572–573.)

Johnson personally settled and paid the claims of two prior owners of the Harlem Stables and two of their employees who had been forced out of business when the gambling room at the Harlem Stables opened. The prior owners, the two Glave brothers, testified that they operated a tavern and night club at the Harlem Stables from

September 1934 to August 1936. In August 1936 they went out there at night and found their equipment and liquor stock gone and workmen busy making alterations in the building. They talked to Sommers about the situation but he professed to know nothing about it. Thereafter they lodged a complaint with the State's Attorney. Two nights later they returned and saw Johnson, Sommers, and others. Johnson told one of the Glaves that he had made a lot of trouble for him and had made the place "a ball of fire." They discussed the matter and a meeting was arranged two nights later. Johnson, Sommers, and others were at the meeting. The Glave brothers asked $3,500 for their investment. Johnson refused and after some negotiating he finally offered to pay $200 to each of them. They agreed and Johnson then personally gave them the money. It was likewise agreed that any claims against the Glaves arising out of their business would be settled by Johnson and that the complaint to the State's Attorney would be withdrawn. (2 R. 283–290, 290–292.)

Two days later one of the Glaves went to Harlem Stables with two of their employees. Johnson agreed to settle the claim of one of the employees for back wages for $100 and he personally handed the money to the employee's wife. A similar agreement as to the second employee's wages had been made at the previous meeting; at this time Johnson directed Sommers to see that the

employee got the money and Sommers had the cashier give the employee the money. (2 R. 287, 472–474, 474–475, 475–476.)

Eleven witnesses testified that Johnson personally employed them to work at the gambling houses or gave testimony indicating that Johnson was instrumental in their being employed (2 R. 177–178, 222–223, 224–226, 276–277, 309, 310, 315, 322–323, 328, 351–352, 387, 396–397; see also 2 R. 319, 326, 339–340; cf. 2 R. 345–346, 347). One of these witnesses stated that he was working at the K & K Club in 1930 when a message came in for the manager and for him that Johnson wanted to see them. They went to the 4020 Ogden Club where they found Johnson waiting for them. He had a garnishment notice and, after reprimanding the witness, discharged him. In 1938 the witness talked to Johnson at the office of William Skidmore and told Johnson he wanted his job back. Johnson berated him for being foolish and a "smart guy" and told him, "You know you could have one of these spots, because I liked your work." Johnson told the witness to meet him at the Dev-Lin the following night. The witness went there and saw Johnson and Sommers. Johnson called the witness over and said to Sommers, "This is one of our good men that couldn't behave himself. I want him to go to work tomorrow." The witness thereafter went back to work at the Horseshoe. (2 R. 176–178.)

Another employee testified that he was playing at the House of Niles in August 1936, and asked Sommers for a job. Sommers told him he would have to see Johnson. The witness saw Johnson at the House of Niles and asked for a job. Johnson told him to park cars at four dollars a day. When the witness protested that he had a large family, Johnson said to make it five dollars. The witness worked at the House of Niles about a month; when it closed he moved to the Harlem Stables. While there he saw Johnson and asked him for extra work at night to earn more money. Johnson sent him to the Villa Moderne, where he worked parking cars at night. (2 R. 224–226.)

A third employee who had been a check room boy at the Horseshoe stated that he saw Johnson and Sommers at the Lincoln Tavern in 1935 and asked for a job. Johnson told him to go to work at the cigar store on the corner of Kedzie and Leland. The witness started to work there the next morning. It was used as a bus station to take customers to the Lincoln Tavern. The witness thereafter worked as a check room employee at a number of the houses. At a later time when he was unemployed he saw Johnson and Hartigan at the Dev-Lin. He spoke to Johnson and Johnson said, "Well, there is nothing right now but I will give you $10.00 a week." Johnson told Hartigan to O. K. the $10.00. Thereafter the witness came

to the Dev-Lin on Saturday nights and was paid the $10.00 by the cashier. (2 R. 309–310.)

Fifteen witnesses testified that they saw Johnson at the various gambling houses here in question (2 R. 20–21, 34, 130, 134, 136, 177, 223, 225, 237–238, 249, 294, 296, 350–351, 352, 363–364, 379, 381, 387; 3 R. 569, 571). One witness who worked at the 4020 Ogden Club in 1931 and 1932 stated that he saw Johnson there an average of twice a week (2 R. 294). Another who was employed at a number of the houses over a period from 1934 to 1939 testified that he saw Johnson at the Horseshoe an average of four or five times a week over a period of eleven months, at the House of Niles twice a week over a three-week period, and at the Harlem Stables about three or four times a week over a period of a few months (2 R. 350, 352). A customer who played regularly at the various gambling houses from about 1936 or 1937 until they closed (1939) stated that Johnson used to come into the Horseshoe in the evening and that she had seen him there quite a few evenings (3 R. 571). When these different witnesses were asked what Johnson was doing, most of them simply stated that they saw him walking around and talking to people. One witness who had worked at many of the houses, however, stated that when he saw Johnson at the houses Johnson was acting "like the head of the house" or "like the head man". (2 R. 350–351, 352.) In describing what he meant by acting like the head man the witness

said that he saw Johnson give money to people many times, either taking it out of his pocket or reaching into the cashier's cage and taking the money from there (2 R. 364). Another witness who played at many of the houses said that Johnson and other of the respondents "were walking around as though they were interested in what was going on—the managers like" (3 R. 569). She stated that Johnson would stand by the cashier's cage and various employees who said they had come to see Johnson would go up and talk to him (3 R. 571).

Johnson regularly appeared upon the scene at the gambling houses when anything out of the ordinary was happening. One witness stated that a robbery occurred at the 4020 Ogden Club in 1933 while he was working there. About twenty minutes after the robbery Johnson came in to talk to Flanagan and two or three others. The witness described Johnson as being angry. (2 R. 294–295.) The same witness told of working under a Tom Barnes at the Horseshoe in 1934. Barnes died in that year. On the last night that the witness saw Barnes at the Horseshoe before his death, Johnson, Barnes, and Hartigan were sitting at a desk at the Horseshoe talking. Thereafter, Hartigan appeared as boss at the Horseshoe. (2 R. 295–296.)

When the Dev-Lin was being constructed as a gambling room in 1935, Johnson was seen there one evening by one of the workmen walking around with Sommers and looking at the building

(2 R. 235–236). In the course of the alterations at the Lincoln Tavern late in 1935 or early in 1936, Johnson came into the room with Wait and another man. Construction work was going on then. They were looking around and talking to one another and stayed about an hour. (2 R. 236–237.) Johnson's appearance and settlement of the dispute over ownership of the Harlem Stables at the time of its opening as a gambling house in August of 1936, which has been previously described, was a similar incident (*supra*, pp. 34–36).

A witness stated that one night in the fall of 1936 when he came to work at the Dev-Lin the place unexpectedly was closed and the whole place looked "like a riot." The men were all told to help get things out of sight. A teamster who regularly handled moving at the gambling houses was there. Love was directing the crew of men. Sommers was present and Johnson, Kelly, Hartigan, and Wait came in later. As Johnson walked by, the witness heard him say, "Well, it is all off". (2 R. 354–355, 368; see also 2 R. 353–354, 372.)

Some of Johnson's statements to various witnesses having direct bearing on his ownership of the houses have already been related (*supra*, pp. 31, 32–33, 35, 36). Several other statements of Johnson's are of particular significance.

On March 27, 1939, Johnson made a formal statement to revenue agents. In the course of the statement he denied that he owned any of the gambling houses. He further said, however, "In

1937 I gambled at Dearborn and Division, Lawrence and Kedzie, 63rd and Cottage Grove, Ogden, and Crawford. That's my own gambling houses". (2 R. 407, 410, 414.)

An employee of the gambling houses, whose testimony has already been referred to (*supra*, pp. 38–39, 40), further testified that when his days of work at the Dev-Lin were reduced, he took a friend, a city office holder, to the club to intercede for him with Johnson. They talked to Johnson and in the course of the conversation Johnson said, "Well, I am not a politician by profession. I am running gambling houses". (2 R. 351–352, 361–362.) The witness did not fix the time of this conversation precisely. It apparently took place in or after 1935, however, for the Dev-Lin was first opened in the spring or summer of 1935. (2 R. 234–236.)

At the trial Johnson testified that he had never owned a gambling house after 1921 (3 R. 987). In rebuttal the Government presented testimony of Johnson given to revenue agents in 1932, when he stated that he was the sole owner of the gambling house he ran, that he ran a place in 1929 at 2141 Crawford, and that he had eight or nine places around 1930 (3 R. 996–998).

Johnson's income tax returns for the calendar years 1927 through 1935 were all prepared by an accountant named Brantman. Brantman also prepared the returns of Sommers, Hartigan, and Flanagan for several years through 1935,

and of Kelly for the years 1934 through 1936. Beginning with the returns for the years 1933 or 1934 Brantman also prepared returns for a great number of the employees of the gambling houses. (2 R. 419–433, 435, 445–448.)

In the spring of 1937 Johnson told Brantman that he was giving the work to someone else and changed to another accountant, Radomski, who prepared his returns for the years 1936 through 1939 (2 R. 101, 433). The others changed at the same time and Radomski prepared the 1936 and subsequent returns for Sommers, Hartigan, and Flanagan and the 1937 and subsequent returns for Kelly (2 R. 94–97, 106–109). Radomski also prepared returns for many of the gambling houses' employees after 1937 (2 R. 110-114). Brantman prepared the 1936 returns for Kelly and ten of the employees but thereafter prepared none of their returns (2 R. 432–433).

Brantman testified that in 1932 he had a conversation in his office with Johnson concerning income taxes. He told Johnson that the Government was making a drive on income tax returns of individuals whose revenue was from illegal sources and that if there were any men or employees he might have it would be well to have them file returns. Johnson said, "I'll see." Later Brantman received a call to go to the Horseshoe. He met Johnson there and Johnson introduced him to Sommers, saying, "Meet my man Sommers."

Johnson asked Brantman to repeat to Sommers what he had told him and Brantman did so. In the course of the conversation with Johnson and Sommers it was stated that Johnson's name was not to appear on the returns of the individuals as the employer. (2 R. 421–423, 429, 435–440.) The returns for most of the persons which Brantman stated he prepared were first prepared after the conversation with Johnson (2 R. 430–431), including the returns of Sommers and Kelly (2 R. 422–423). Although it is true that the foregoing conversation occurred about 1932, it was certainly relevant here, for it fixed the status of Johnson and his subordinates as of that time, and the jury was plainly warranted in assuming the continuance of that status during the years here involved in view of all the other facts before it.

Moreover, if all of the evidence summarized above is taken in the light most favorable to the Government, as it must be (*Glasser* v. *United States*, 315 U. S. 60, 80), it furnishes overwhelming support for the conclusion that during the period covered by the indictment Johnson had at least a dominant interest in the principal gambling houses involved. The evidence, however, showed much more. It revealed Johnson's interest to be that of the owner of the houses. The evidence pictured Johnson acting as the owner, and making statements which in the circumstances of this case were substantial admissions by John-

son that he was the owner. The statements to the revenue agents, the dispute over the Nationwide News rates and the complaint about politicians all contained such admissions.

Other factors in the case strongly supported the conclusion that Johnson was the owner. As will be later shown, the income of the gambling houses over the period from 1936 through 1939 averaged approximately $775,000 a year. Johnson was the one who reported annual gambling income during these years, ranging from $103,000 to $256,000. The annual gambling income reported by Sommers, Hartigan, Flanagan, and Kelly during the same period ranged from $3,600 to $19,000. By their very returns, therefore, the respondents portrayed Johnson in his true stature in their operations. Johnson was likewise the one who was able to spend $145,000 in cash for a country estate and about $700,000 in developing the Bon-Air Country Club. (*Infra*, pp. 66, 71–72, 102–107; chart.) The other respondents lived relatively modest lives (2 R. 458–459, 463–464, 469–470). Moreover, as will be shown in detail in Point III, *infra*, p. 91 *et seq.*, Johnson expended vast amounts in excess of his resources and reported income during at least three of the years in question; the jury could therefore fairly infer that the profits of the houses with which Johnson had been so closely identified constituted the source of those expenditures and that Johnson was the true owner of those houses.

From all of the Government's evidence, therefore, a substantial foundation as to Johnson's ownership of the gambling houses was built. The evidence was not trivial and isolated. The incidents related were individually strong and cumulatively powerful The conclusion of ownership arising from the various incidents was not the result of mere speculation; they included many direct acts and statements indicating ownership. It is obvious that the true ownership of an illegal business elaborately concealed is not easily demonstrable. But certainly the evidence was more than sufficient to raise a jury question as to Johnson's ownership. *Cf. United States* v. *Wexler*, 79 F. (2d) 526 (C. C. A. 2d), certiorari denied, 297 U. S. 703.

Not only was a substantial case made out by the Government prior to the time it rested but at the conclusion of the defense testimony the Government's case was even stronger. At all times in the trial it was conceded that Johnson was a gambler and that his income was from gambling. He reported large amounts of income. The defense explanation of how Johnson obtained this large income from gambling was as follows: All of the houses principally in issue had a $100 limit on individual bets at dice. Players on numerous occasions would wish to bet larger amounts. Johnson might be in the house. If not, Sommers or Hartigan or Kelly or Flanagan (depending on the house involved) would call Johnson. Johnson would then take over the table. The table

would be cleared and checked as to money, chips, etc. An amount of new dealing money would be left by the house for which Johnson would pay. Johnson would put down his bank roll, taking it from his pockets or from a box he carried. The play would then start with betting unlimited and with Johnson banking the game, that is, taking all bets. The houses' regular employees, "box man," "dealers," and "stick men" handled the game. Johnson might deal or act as box man or simply watch the game. At the end of the play the table would again be checked and Johnson would recover his bank roll and take all winnings. Such games were said to last a short while at times, and sometimes the whole night.[7] (3 R. 793–794, 796–798, 801, 802–803, 820, 841, 879–880, 889–891.)

In support of that ingenious explanation, the defense produced evidence of the flimsiest char-

[7] Not many explanations of the source of Johnson's income were open to him. The record discloses the commonly known fact of the odds in favor of the house in gambling at a dice table (3 R. 845–847) and it is obvious that Johnson could not have produced regular large winnings over a period of four years by playing independently at established houses against the house. Equally clearly, he could not have made the large sums of money reported solely by banking private games. This left as possible explanations only that he owned these houses, as the Government charged, that he owned some other large group of gambling houses (an explanation foreclosed by the evidence here), or the explanation he chose to make that in some way he banked part of the gambling at these gambling houses.

acter that was not only inherently incredible but was inconsistent in a material respect with a prior explanation made by Johnson. Surely, the jury was competent to pass upon the credibility of these witnesses, and determine for itself whether they were telling the truth.

Although the indictment covered a period of four years, and although a great many employees of the various houses would have observed these operations, if they had actually taken place, the defense called but three employees as witnesses to testify with respect to such activities (3 R. 793–794, 796–798, 801, 802–803). That testimony was so fragmentary and unsatisfactory that the jury was patently justified in rejecting it as a credible explanation. Moreover, although Sommers and Kelly stated that such occurrences took place in the houses which they claimed to own (3 R. 820, 841, 879–880, 889-891), Flanagan made no mention of any such procedure in his testimony. Sommers said that he arranged the games with Johnson to accommodate his customers who wanted to place higher bets than he could afford to back (3 R. 820). Kelly simply said that he was glad to have Johnson there for Johnson had a fine reputation and he was a small gambler trying to make a reputation (3 R. 890). Both testified that Johnson paid them nothing as a result of this arrangement (3 R. 841, 890–891).

Although this explanation may carry some special significance to the gambling initiate it appears highly dubious to the lay mind that actual owners of gambling houses would permit an outsider to profit from their customers by the use of their equipment and employees at the expense of interruption of their own play solely in return for some nebulous goodwill. And the improbability of this explanation is increased when it is recalled that Johnson's purported yield from the occasional big games which he claimed he banked far outweighed the reported profits from the regular play at all of the houses combined.

More than this, however, the defense as outlined at the trial was inconsistent in a very material respect with a prior explanation of Johnson's. In his statement to the revenue agents in 1939, introduced in evidence, Johnson said that when he handled gambling in the houses he took a piece of the play on a percentage basis, that there was no continuous arrangement but a specific arrangement was made each time and whatever the amount of money the others put up governed the percentage of winnings they took. (2 R. 414–416.) At the trial Sommers testified that when Johnson took over the table in the manner described he had no further interest in it (3 R. 820). Kelly testified that when he turned over the table to Johnson it was Johnson's and he stood the losses and took the winnings (3 R. 880, 891). Neither mentioned that he ever put up

part of the money or took a percentage of the winnings. None of the three defense witnesses who told of Johnson's taking over a gambling table said anything about the house taking part of a bet while Johnson played. In his testimony at the trial Johnson said that by the reference to percentages in his prior statement he meant that if a bet of $100 were made the house was at liberty to take a part of it, say $20, and in that case it would take twenty percent of the winnings immediately after the particular bet was over. He further said that these transactions took place quite a few times but that in comparison to the number of times he played they were rare. (3 R. 957–959.) The defense explanation of the source of Johnson's gambling income was further shaken by the fact that of the fifteen Government witnesses who said they had seen Johnson at the various houses none testified that they had seen him gambling. Ten of these witnesses were expressly asked or described what Johnson was doing when they saw him at the houses. Three specifically testified that they never saw Johnson gambling. (See record citations, *supra*, pp. 38–39.)

The Government's evidence thus forced Johnson to explain the source of his admittedly large gambling income or leave unchallenged the conclusion that he was the owner of the gambling houses and that these supplied his income. The weakness of his explanation buttressed the vast

amount of the Government's affirmative evidence that he was the owner of the houses. Since there was ample evidence to support the conclusion that Johnson owned the various houses in question, the jury was fully justified in attributing the profits of the enterprise to him. Cf. *United States* v. *Wexler*, 79 F. (2d) 526 (C. C. A. 2d), certiorari denied, 297 U. S. 703.

3. *Evidence as to the income of the gambling houses*

No permanent records of any kind were maintained by the gambling houses beyond a set of accounts for the restaurant at the Horseshoe (2 R. 459, 465, 469; 3 R. 941). As has been stated, however, horse-racing bets at the houses were first recorded by sheet writers on duplicate sheets (*supra*, p. 16). The cashier then recorded the payment of winning bets on the original sheet, and both duplicate and original sheets later went to the manager of the house (2 R. 178–179, 248–249, 281, 298, 330–331). The houses thus had an accurate record of all horse-race betting. These sheets, however, were all regularly destroyed (2 R. 299; 3 R. 825–827, 885–886, 941). Similarly, many of the houses kept records of amounts paid out at the other games, dice, roulette, etc., by means of pay-out checks and cashier's sheets (2 R. 300, 465–466; 3 R. 826–827, 886, 941, 945). These slips and cashier's sheets were likewise systematically destroyed (3 R. 826–827, 886, 941).

None of the respondents kept permanent personal records of their gambling income. All stated that they recorded monthly totals of gains. On the request of revenue agents, Johnson produced his monthly totals, Hartigan produced them as to one year, but Kelly supplied none. In testifying at the trial Sommers presented monthly records as to 1939 and Kelly as to 1937, 1938, and 1939.[8] (2 R. 412–418, 459, 465, 469; 3 R. 710–711, 736–737, 767–768, 772–773, 818–819, 824–825, 886, 948, 985.) None of the respondents turned over any books or records to the accountants to be used in the preparation of income-tax returns. All simply gave the accountants a lump-sum figure for the year's gambling income. (2 R. 96–97, 105–110, 420–421, 422–429.) None of the respondents kept bank accounts in which gambling income was deposited, although Johnson stated that he deposited some of his gambling income in bank accounts.[9] (2 R. 411–412, 459, 463, 464, 468; 3 R. 948.)

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[8] Johnson was advised by his accountant in 1933 or 1934 that the Government was demanding that all taxpayers keep complete books and records of their income (2 R. 420). In his statement to the revenue agents Johnson said he was never told to keep gambling records (2 R. 417).

[9] Johnson told revenue agents and Brantman at a conference on his income-tax returns in 1934 that he did not keep bank accounts of his entire business because he did not want to build up evidence against himself to be used for law enforcement (2 R. 433). Sommers was asked by a teller at the Northern Trust Company why he did not deposit checks in his account, and he told the teller that he did not want them in his account, that it would be charged against his income (2 R. 505).

In this situation the only possible method of proving the income of the gambling houses was that adopted by the Government of showing the amount of checks cashed and currency exchanged for the gambling houses at currency exchanges and banks.[10] In summary, the amounts of these items disclosed by the evidence and charged by the Government to represent Johnson's income[11] are as follows.

1936

Checks cashed at Albany Park Currency Exchange	$255,415.97
Currency deposited at Albany Park Currency Exchange	6,700.00
$100 bills received from Lawndale Currency Exchange	11,600.00
Checks cashed at Northern Trust Company	111,578.60
Currency exchanged Northern Trust Company	100,000.00
Total income of gambling houses	485,294.57

1937

Checks cashed at Albany Park Currency Exchange	623,690.56
Currency deposited Albany Park Currency Exchange	87,100.00
$100 bills received from Lawndale Currency Exchange	42,100.00
Currency exchanged Northern Trust Company	100,000.00
Total income of gambling houses	852,890.56

[10] At no time have the respondents controverted the fact that the checks and currency involved represented transactions of the gambling houses here in issue. (See e. g., 2 R. 2.)

[11] Included in the computation of Johnson's income by the Government's expert witness were amounts for checks cashed by the defendant Creighton (4 R. 28, 30, 32). The inclusion of these amounts is not necessary to sustain the convictions and since Creighton was acquitted, the amounts identified with him have not been included in the present discussion or computations, except the relatively small amounts indicated in footnote 19, *infra*, pp. 60–61.

1938

Checks cashed at Albany Park Currency Exchange	376,783.14
Currency deposited Albany Park Currency Exchange	141,000.00
$100 bills received from Lawndale Currency Exchange	19,800.00
Currency exchanged at Northern Trust Company	100,000.00
Checks deposited in North Shore National Bank (Lawrence Avenue Currency Exchange)	66,305.29
Checks deposited in Central National Bank (Lawrence Avenue Currency Exchange)	147,105.77
Total income of gambling houses	850,994.20

1939

Checks deposited at Central National Bank (Lawrence Avenue Currency Exchange)	886,499.30
Currency exchanged at Northern Trust Company	40,000.00
Total income of gambling houses	926,499.30

Albany Park Currency Exchange.—We have previously related the manner in which Sommers cashed checks and exchanged currency at the Albany Park Currency Exchange and the identification of this business with the Horseshoe, Lincoln Tavern, Harlem Stables and D & D Club (*supra*, pp. 27–29). This business continued at the exchange from June 1936 to July 1938 (2 R. 477). The records of the exchange showed that checks cashed on behalf of Sommers from June through December 1936 totaled $255,415.97 (Govt. Exs. X–139–X–145; 2 R. 480–481). Similar checks were cashed in 1937, between January and September, in the amount of $623,690.56 (Govt. Exs. X–146–X–154; 2 R. 481–482, 4 R. 30). From January 1938 until the termination of the business in July of that year checks in the amount of $376,763.14 were cashed (Govt. Exs. X–158–

X–164, X–191a, etc.; 2 R. 481, 482–483, 497; see also 2 R. 484–485). The owner of the exchange testified that most of the checks cashed were paid by the exchange in $100 bills (2 R. 479).

The owner of the Albany Park Currency Exchange likewise stated that Sommers exchanged currency on two occasions in 1936 totaling $6,700. During 1937 deposits of currency for exchange totaled $87,100. In 1938 currency in the amount of $141,000 was exchanged. (2 R. 486–487.) In the Government's computation of income, amounts were eliminated from this testimony as to currency exchanged to allow for occasional redeposits of excess currency by the exchange itself (2 R. 492, 498; 4 R. 27, 30). According to the exchange owner's testimony, one-half of the currency exchanged on behalf of Sommers was paid out by the exchange in the form of $100 bills (2 R. 499; see also 2 R. 500–501; Govt. Ex. X–191a, etc.).

Northern Trust Company.—Two tellers of this bank testified that they cashed checks and exchanged currency for Sommers every other day or about twice a week during a period from 1934 to 1936 (2 R. 503–504, 506–508). The bank records showed that from January to May 1936 Sommers cashed checks in the amount of $111,578.60 (Govt. Exs. X–170–X–171; 2 R. 503–504, 507–508). A special paying teller at the same bank testified that from 1936 through part of 1939 he exchanged currency for Sommers approximately three times a month over periods of six months. He stated

that the amounts exchanged totaled approximately $100,000 for each of the years 1936, 1937, and 1938, and $40,000 for 1939. A portion of these amounts was paid to Sommers in $100 bills. (3 R. 604–605.)

Lawndale Currency Exchange.—The manager of the Lawndale exchange testified that beginning in 1936 he regularly cashed checks and exchanged currency for Flanagan and one of his subordinates[12] at the 4020 Ogden Club. The witness stated that when currency was exchanged he paid Flanagan or the employee in $100 bills and that there were no other customers of the exchange that ordered $100 bills. (3 R. 552–554.) The records of the exchange showed that $100 bills were handled in the amount of $11,600 in 1936, $42,100 in 1937 and $19,800 in 1938 (3 R. 560–562, 565–566; Govt. Exs. X–172d, etc., X–173c, etc., X–174a, etc.).

Lawrence Avenue Currency Exchange.—The opening of this exchange by Brown in July 1938, and its operation through September 1939, have previously been described (*supra*, pp. 29–30). The books and records of the exchange were apparently concealed or destroyed and could not be secured by the Government.[13] Sommers, Hartigan, and Kelly,

[12] Couch, the doorman and handyman at the 4020 Ogden Club (3 R. 948).

[13] An employee at the building where the exchange was located testified that Bernice Downey, Brown's partner in the exchange, and her sister, took the books and records from the exchange about three weeks after the exchange closed in 1939 (3 R. 597–598; see also 3 R. 588–589). The

however, admitted that checks were cashed at the Lawrence Avenue Currency Exchange which represented transactions for the gambling houses claimed to be owned by them (2 R. 459, 463, 467–468; 3 R. 816–817, 837–838, 842, 883–884). The Government was able by other evidence to show that the checks of the gambling houses were recorded in an account of the exchange entitled "Reserve for uncollected funds" and that the total of checks passing through this account for the period of the operation of the exchange was $1,100,000. The respondent Brown admitted to the accountant who audited the exchange books, that all of the funds in the "Reserve for uncollected funds" account were from one source and that that source was Mr. Johnson. (2 R. 535–536.) And although that admission was chargeable only against Brown, the evidence as to the method of business of the exchange permitted the jury to draw the same conclusion against the other respondents as to the nature of the reserve account. In summary the method by which the exchange handled the gambling checks was as follows:

Each morning when the exchange opened Bernice Downey, Brown's partner, brought checks into the exchange. These apparently were picked up by her at the Horseshoe. They were totaled by

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Downey sisters testified that they had been subpoenaed to produce the books but stated that they had never had them. Bernice Downey testified that she last saw the books at the exchange when it closed (3 R. 695–696).

her in the morning and recorded in the exchange books. Early in the afternoon the checks were picked up by the armored car delivery service. (3 R. 596–598.) Later in the afternoon Brown or Miss Downey telephoned a special paying teller at the bank in which an account for the exchange was maintained and gave an order for the amount and denominations of currency to be delivered. The bank teller prepared the order and the currency was delivered to the exchange by armored car service the following day. (3 R. 596–597, 598, 611–612.) After the delivery of the currency to the exchange Brown divided it into separate piles. Sommers and a man named Fred [14] then called and took the money [15] (3 R. 596, 598).

From this course of business it was apparent that the gambling checks were received by the exchange on one day and forwarded to its bank for collection and that payment was made on the checks by the exchange on the following day. The accountant for the exchange testified that the exchange had two types of check-cashing transac-

[14] Apparently Fred Gitzen, an employee of Creighton's (3 R. 869).

[15] From July 21, 1938, to August 16, 1938, the method of handling the transactions between the exchange and the bank was of a somewhat different character (3 R. 606–607); on the latter date, Brown transferred the exchange account to another bank (3 R. 608–609). The method described above was that used subsequent to August 16, 1938. The methods by which Sommers and Miss Downey operated, however, apparently did not vary during the entire operation of the exchange.

tions, one in which cash was paid out immediately and the other in which cash was not paid immediately but in which the check was forwarded for collection and cash paid out on the following day. Checks included in the latter type of check transaction were totaled by the exchange and the sum total credited to the account "Reserve for uncollected funds." Checks on which the exchange made immediate payment were not entered in this account but were listed on a teller's blotter. (2 R. 535.) The "Reserve for uncollected funds" account thus included a record of the gambling checks and was exclusive of other checks cashed immediately by the exchange. Since ordinary accounting practice would require that checks from different sources on which payment was not made immediately be entered in separate reserve accounts (2 R. 536), and since the Lawrence Avenue exchange had only the one reserve account, the jury might properly have concluded from this method of accounting,[16] that all checks entered in the "uncollected funds" account were from a single source, i. e., the gambling houses.[17] Moreover,

[16] No change appears to have been made in the method throughout the history of the exchange (2 R. 532–533, 535–537).

[17] The character of the "uncollected funds" account was further indicated by the fact that Brown apparently did keep an itemized record of the checks entered in the account, not in the regular exchange books, but in two small black books of which he and Miss Downey kept personal possession (2 R. 533, 538; 3 R. 597).

that conclusion is fortified by the fact that this account contained only entries of totals of groups of checks and not separate entries of single checks, whereas the teller's blotter on which checks paid immediately were entered included a detailed record as to each check (2 R. 535, 543–544). The accountant for the exchange further testified that the checks entered in the "Reserve for uncollected funds" account during the period of operation of the exchange totaled $1,100,000 (2 R. 537). The total of all checks cashed by the exchange during the period, as evidenced by records of its bank deposits, was $1,469,213.30 (Govt. Exs. X–178, X–183).[14]

It was shown further that the bulk of the currency drawn by Brown for payment on checks cashed consisted of $100 bills. From July 21, 1938, to August 16, 1938, Brown maintained an account for the exchange with the North Shore National Bank. During this period he received approximately $85,000 in cash, mostly in $100 bills. (3 R. 606.) From August 16, 1938, to the closing of the exchange in October 1939, Brown employed an account in the Central National Bank. He withdrew currency from this bank almost daily during that period and his withdrawals of cur-

[14] There was some testimony (2 R. 537) to the effect that the total cash turnover for the period in question was $2,600,000. But that figure, even if accepted, must represent exchanges of currency, etc., in addition to the check-cashing transactions described above.

rency included $100 bills of an average daily total of from $3,000 to $5,000. (3 R. 611–612.) In the light of the conceded fact as to the cashing of the gambling house checks at the Lawrence Avenue Exchange and the practice of payment on those checks in $100 bills while the business was previously being conducted at the Albany Park Currency Exchange (*supra*, pp. 53–54), the evidence just recited as to the amount of the gambling checks cashed at the Lawrence Avenue Exchange is corroborated by the use of $100 bills by that exchange. For, on the basis of the stated average daily withdrawals of the Lawrence Avenue Exchange of $100 bills, a conservative estimate of the total of such bills used during its period of operations would approximate the $1,100,000 total of the "Reserve for uncollected funds" account. (See also 3 R. 612, 693–694.)

The percentage of gambling checks thus cashed ($1,100,000) by the exchange to its total of all checks cashed ($1,469,213.30) was 74.87. The Government accountant has computed the amount of gambling checks cashed in each of the years 1938 and 1939 by applying this percentage to the total of all checks cashed by the exchange in each of those years as shown by the bank records (4 R. 33, 34). The resulting amounts are those included in the preceding summary.[19]

[19] Although there were apparently included in the gambling checks cashed at the Lawrence Avenue Currency Ex-

The foregoing transactions at the various currency exchanges fall into two major categories: (a) the cashing of checks, and (b) the exchange of currency. We submit that the jury was fully warranted in concluding that both the amount of checks cashed and the amount of the currency exchanged represented with substantial accuracy income to the houses.

As to the checks.—The record discloses and the respondents do not and could not deny that customers cash checks in gambling houses to pay losses when their cash is gone (2 R. 215–216, 219, 220–221, 405, 3 R. 546, 548–549, 816, 879). The respondents contend, however, that they cashed accommodation checks for customers and checks which were in part losses to the customers and in part accommodation (2 R. 463–464, 468; 3 R. 816, 879). They argue, therefore, that the mere cashing of checks is not sufficient evidence of income. Although accommodation checks may conceivably have been cashed at times in small amounts, it was entirely reasonable to conclude that in view of the large amounts here involved the respondents would assume the col-

change some checks cashed by Creighton, the exclusion of these checks from consideration here would not affect the convictions of these respondents. Creighton's testimony as to the number of checks cashed by him at the Lawrence Avenue Exchange was that he cashed "some checks" or "a few checks" there and that he did not cash them every day. (3 R. 858–859, 868–869.)

lection risks inherent in gambling checks only where required to do so to collect for the customers' losses and that the accommodation cashing of checks would be only a minor factor.[20] Moreover, it was reasonable to infer that in the typical situation the patron would tender a check only after he had lost the cash which he had brought with him. Thus, the acceptance of a check by the gambling house would indicate not only that the amount of the check itself represents winnings to the house, but that the patron had already lost his cash to the house. Accordingly, the amount of the accommodation checks was probably far more than offset by the amount of cash lost by the patrons at the gambling houses before they found it necessary to pay off additional losses with checks. The receipt of a check from a customer by a gambling house was certainly substantial evidence of the house's receipt of income.

As to the exchange of currency.—The great bulk of the income attributed to the gambling houses was reflected in the checks just discussed; the re-

[20] The respondents indicate the true strength of their argument by further contending that they cashed checks for persons in the neighborhood (3 R. 816, 842, 879). It may well be asked how many neighboring tradesmen and workingmen would seek out a gambling house and negotiate entrance with an accompanying searching for firearms (2 R. 416), in order to cash a check.

mainder consisted of currency exchange transactions.[21] A substantial amount of the currency so charged as income was received as a result of the exchange of smaller bills for $100 bills. The houses all had a limit of $100 on single bets, and their working money, that is, money used on the tables in gambling, was of lesser denominations (3 R. 792–793, 795, 803, 820, 879, 885, 939). It was therefore reasonable for the jury to conclude that at least as to the $100 bills the money was taken out of the business as gambling winnings of the houses, and was not merely an attempt to replace old money with new for use on the tables. The respondents, however, argue that the exchanging of currency was merely a turn-over in their bank rolls[22] and that $100 bills were used at the houses to pay winnings over that amount (3 R. 792–793, 795, 803, 816, 879, 939). Assuming that this might happen, the jury certainly could have

[21] Indeed, the convictions may be sustained even if the exchanges of currency be completely eliminated from consideration. Accordingly, if the Court should conclude that the evidence with respect to the checks was sufficient, it is immaterial whether the evidence with respect to the exchange of currency was sufficient.

[22] In his prior brief to this Court the respondent Johnson indiscriminately argues that all of the Government's evidence as to amount of income could equally be called a mere turn-over of bank roll (Br. 67, 72). Clearly, however, the cashing of customers' checks is not a regular bank roll turnover.

inferred that the very quantity of money in $100 bills taken by the houses made the respondents' explanation implausible, and in any event it had the advantage of judging their veracity from their demeanor on the witness stand. Moreover, any inaccuracy in this respect in the Government's proof of income would undoubtedly be offset by additional income which the houses must have earned and which was not reflected in the currency exchange transactions.

The foregoing discussion shows that there was sufficient evidence for the jury to conclude that the checks cashed and currency exchanged, at least in the larger denominations, represented winnings or profits to the gambling houses. Indeed, the actual winnings or profits may have been considerably in excess of these amounts, for it is reasonable to assume that very substantial amounts of cash lost by the patrons to the gambling houses never passed through any of the currency exchanges, but were simply withdrawn directly from the till as profits. Moreover, as we shall undertake to show in Point II, *infra*, pp. 82–91, in response to Question 2 of the Court's order, the jury could reasonably have concluded that the winnings or profits reflected in the check cashing and currency exchange transactions repre-

sented with substantial accuracy taxable *net* income of the gambling houses.

4. *Summary of evidence as to Johnson on the substantive counts*

In conclusion as to the respondent Johnson, we submit that the record contains compelling evidence of the operation of the various gambling houses in a manner showing unitary ownership, control and operation. Equally strong evidence was introduced which demonstrated that Johnson had an interest in the gambling houses. This interest of Johnson's was shown to be that of ownership by evidence of numerous and repeated direct acts of ownership on the part of Johnson and by direct admissions of ownership by Johnson. Circumstantial evidence likewise strongly reinforced the direct evidence of Johnson's ownership.

The income of the gambling houses thus shown to be owned by Johnson was proven by credible evidence. The showing of ownership made proper the charging of that income to him.

The amount of gambling income reported by Johnson, the description of this income on his returns and the amounts of income of the gambling houses demonstrated by the Government for

the years covered by the indictment are as follows (Govt. Exs. R–10—R–13; *supra*, pp. 52–64):

Year	Description of occupation	Income from business (gambling) reported	Income of gambling houses shown
1936	None shown	$145,165.70	$485,294.28
1937	Speculator and Farmer	255,240.70	852,800.56
1938	Speculator and Farmer	103,265.70	850,994.20
1939	Speculator and Farmer	256,710.00	926,490.30

Given the ownership of the gambling houses by Johnson and the large unreported income, there could be no doubt of Johnson's wilful intent to evade the taxes on the unreported income. The elaborate concealment of ownership during the period covered by the indictment and thereafter, the concealment of income by failure to keep books and records and bank accounts, the filing of false income-tax returns by Johnson and the denial of ownership by Johnson to revenue agents, all make this plain.

On all phases of the case, therefore, including the question of the ownership of the gambling houses, there was substantial evidence which warranted submission by the trial court to the jury of the charges made as to Johnson in each of the four substantive counts. But even if it should be held that all of the evidence recounted above was insufficient to charge Johnson with having received the profits of the gambling houses, a jury question was clearly presented as to Johnson's guilt on the second, third, and fourth counts, covering the years 1937, 1938, and 1939, under the Government's evi-

dence as to Johnson's expenditures during those years. That evidence will be discussed in detail in Point III, *infra*, p. 91 *et seq.*

5. *Evidence as to the respondents Sommers, Hartigan, Kelly, and Brown on the substantive counts*[23]

The evidence bearing on the guilt of the respondents Sommers, Hartigan, and Kelly follows identical patterns and may be discussed together. The evidence relating to the respondent Brown is of a different character and will be separately considered.

a. Sommers, Hartigan, and Kelly.—All of the evidence previously described of the unitary operation and ownership of the gambling houses claimed to be owned by these respondents is available to support the charges of their aiding and abetting Johnson's attempts to evade. As has been stated, the evidence of these respondents working interchangeably as bosses at the various gambling houses in itself destroyed their defense of their separate ownership of the houses and revealed them in their true light as employees. All of the evidence of direct acts of ownership by Johnson and all of the circumstantial evidence

[23] As we advised the Court in our previous brief, we are informed and are satisfied that Flanagan is now dead. Accordingly no detailed discussion of the evidence as to his guilt will be made. Sufficient evidence has been previously related to justify charging Johnson with the amount of currency exchanged by Flanagan (*supra*, pp. 13, 15–18, 21–22, 23–24, 27, 30, 32–33, 38, 39, 41–42, 55).

of Johnson's ownership likewise supports their convictions. In place of the direct admissions of ownership by Johnson are a number of declarations as to Johnson's ownership of the houses made by these respondents and chargeable against the declaring respondent.

A customer at the Horseshoe testified that in July, 1937, he asked Sommers for a loan. Sommers told him that he would have to get in touch with the boss. Sommers then made a telephone call and afterwards made the loan to the witness. The witness asked Sommers who this big boss was and Sommers told him it was Johnson. (3 R. 545–546.) Sommers discharged an employee at the Horseshoe for stealing quarters at the tables. He told the employee that "the only one that can take care of you now is the big boy, you will have to see him about it." The witness stated that he knew that "the big boy" was Johnson. (R. 356–357.) A customer testified that on one occasion at the Horseshoe an argument arose at a gambling table and that Sommers informed the participants that if they had any complaints to make them to Johnson (3 R. 567–568). The incident in which the same witness protested about the reduction of a gambling limit at the Horseshoe and was told by Sommers to see Johnson, has previously been related (3 R. 566–567). When the check cashing business of the houses was changed from the Albany Park exchange to the Lawrence Ave-

nue exchange in 1938 Sommers told the owner of the Albany Park exchange it was done because Brown was a tenant in "their" building (2 R. 477; see also 2 R. 225).

The statements of Johnson made in the course of the settlement of the dispute over the ownership of the Harlem Stables and the conversation of Johnson with the accountant Brantman in which it was stated that Johnson's name was not to appear as the employer on the income tax returns of the houses' employees were made in the presence of Sommers. (*Supra*, pp. 34–36, 42–43.) They are, therefore, applicable to the charges against Sommers.

On one occasion at the Lincoln Tavern, Hartigan called together the "shills" employed there, told them of "shill" money (specially marked) disappearing from the table and warned them that if it continued he would fire the crew (2 R. 355–356). Hartigan further said (2 R. 356), "And again, I want to remind you that when you go home, or come in here, or on your way amongst yourselves, or amongst the public, if you are ever asked who you are working for, don't say that you are working for Mr. Bill Johnson, and don't discuss about it. Don't discuss anything that is going on here, not only amongst customers but even among yourself. Talk about something else." One witness testified that in 1934 Hartigan was telling him about a gambling incident and that Hartigan said

it happened before he was working for Bill. The witness stated that Johnson was called Bill so often he assumed the conversation concerned Johnson (2 R. 300–303, 304–305). Hartigan hired two employees in response to letters addressed to Johnson and one in response to a note reading, "Please put bearer to work" and signed "Bill" (2 R. 319–321, 326, 345–346).

Kelly's income-tax return for the year 1934 was investigated by the office of the Collector of Internal Revenue and a call letter sent to him. Brantman, the accountant, thereafter appeared on behalf of Kelly on November 25, 1935. In the course of the conference, Brantman told an auditor for the Collector that he did the accounting for the employer of Kelly. (3 R. 706–707.) Brantman has previously been shown to have acted as accountant for Johnson from 1927 through 1936 (*supra*, pp. 41–42).

Given the ownership of the gambling houses by Johnson, therefore, and his failure to report a large part of the income therefrom, the guilt of the respondents Sommers, Hartigan, and Kelly in aiding and abetting the attempted evasion becomes clear. Each of these respondents during all of the years covered by the indictment participated in the operation of the gambling houses in question in a manner to conceal Johnson's financial interest in the houses and the amount of the income of the houses.

Each of the respondents filed incomplete and misleading income-tax returns for each of the years covered by the indictments. The description of income, occupation, and amount of income reported by each of the respondents as revealed by their returns introduced into evidence were as follows:

SOMMERS

(Govt. Exs R–35—R–42)

Calendar year	Description of occupation on return	Description of gambling income reported	Amount of gambling gross income reported	Amount of net taxable income reported
1932	None shown	Misel. Commissions	$8,313.00	$7,155.25
1933	None shown	Misel. Betting Commissions	6,492.00	5,377.40
1934	None shown	Misel. Speculative Earnings (Salary).	6,785.00	5,977.00
1935	Manager	Salaries, wages, commissions, etc.	4,880.00	4,402.10
1936	Restaurant and Speculator.	Misel. Income as Speculator	11,000.00	9,482.40
1937	Restaurant and Speculator.	Other income Speculator	19,274.38	9,942.80
1938	Restaurant and Speculator.	Other income Speculator	8,200.00	9,160.79
1939	Speculator	Other income	11,243.00	12,529.16

HARTIGAN

(Govt. Exs. R–52—R–57)

Calendar year	Description of occupation on return	Description of gambling income reported	Amount of gambling gross income reported	Amount of net taxable income reported
1934	Manager	Misel. Speculative Income (Salary).	$13,700.00	$12,840.00
1935	None shown	Miscellaneous Income	8,600.00	274.60
1936	Manager	Misel. Speculative Income Est.	15,875.00	15,728.00
1937	Speculator	Other income Speculator	13,628.00	13,422.50
1938	Speculator	Income from business or profession.	11,500.00	11,376.00
1939	Gambler	Income from business or profession.	16,100.00	15,999.31

(Govt. Exs. R-14—R-19)

Calendar year	Description of occupation on return	Description of gambling income reported	Amount of gambling gross income reported	Amount of net taxable income reported
1934	None shown	Misel. Commission Earnings (Salary).	$4,745.00	$4,365.00
1935	Clerk	Salaries, wages, commissions, etc.	1,800.00	1,607.00
1936	Manager	Salaries, wages, commissions, etc.	3,655.00	3,588.50
1937	Speculator	Other income Speculator	9,135.00	9,066.50
1938	Speculator	Income from business or profession.	10,435.00	10,364.50
1939	Gambler	Income from business or profession.	10,324.00	10,280.50

In December 1939, Sommers and Hartigan each made a formal statement to revenue agents (2 R. 460). Sommers at that time stated that he was the proprietor of the Horseshoe and Dev-Lin, that nobody was associated with him in his business; that he was alone and had no partner; that he had no relations with Johnson other than Johnson coming to his place to gamble; that Johnson had no connection with the operation and that no one else had any interest in it (2 R. 467, 470).

Hartigan said that he owned the Harlem Stables, that no one was connected with him in the operation and that he was the sole owner; that he had no connections with any other gambling houses, no connection with the Horseshoe or Dev-Lin and no financial transactions through it, that he had never been the manager of any place of business; that he never worked for anyone

else within the last ten years and that he never got a salary from Johnson, that he operated the business solely on his own account, no one else was interested in it, that Johnson had no interest in the business operated at the Harlem Stables and had had none during the last three years; that Johnson had no connection and no one else was interested in it, and that he called in Johnson when the crap games got too heavy but that Johnson was not a partner (2 R. 462–466).

Kelly gave a similar statement to Government agents on January 3, 1940 (2 R. 457). He stated that he was the owner of the D & D Club and had been for a little over three years, that nobody was associated with him in his business, that Johnson had no interest in his business but gambled there, that he had no interest in any other gambling house (2 R. 458–460).

In operating the gambling houses in a manner to conceal the income therefrom and Johnson's ownership of that income, these respondents must have known and intended that Johnson would thereby be assisted in concealing this income. In filing incomplete and misleading personal income-tax returns which likewise aided in this concealment, their intention in this respect is made more plain. If any doubt remained, their making of false statements to Government revenue agents denying any interest or ownership in Johnson established beyond doubt their intention to aid John-

son in attempting to evade his income taxes for the years here in question. Their intention to aid Johnson's criminal purpose having been established, any of their acts of concealment which have been enumerated was sufficient to sustain their conviction. Each was shown to have performed acts of concealment in or relating to each of the years covered by the indictment. Further, all of these acts were directed toward a continuing concealment of Johnson's interest in the gambling houses and affected all of the years named in the indictment.

The ruling of the court below (1 R. 195–196) that the evidence was not sufficient to support the convictions of the codefendants on the first four counts proceeds upon a misunderstanding of the crime with which they were charged. Since the court found nothing in the record to the effect that the co-defendants had anything to do with the preparation of Johnson's returns, it assumed that there was no evidence to sustain the charge against them. But the co-defendants were not charged with assisting in the preparation of false returns. They were indicted primarily for aiding and abetting Johnson in his attempt to evade and defeat his tax. The aiding and abetting consisted, not of assisting in the preparation of his returns, but rather of their collaboration with him in a course of conduct that made it possible for him to attempt

to evade the taxes in question.[24] That their collaboration was wilful is shown by their statements to the revenue agents who interviewed them about their gambling activities and their relations with Johnson. The jury was plainly justified in concluding that their assistance to Johnson was directed not merely at avoidance of state or local prosecution for gambling, but also at an attempt to evade and defeat his Federal taxes.

b. Brown.—The theory of the Government's case as to the respondent Brown was that he operated the Lawrence Avenue Currency Exchange during 1938 and 1939 on behalf of the other respondents as a further means of aiding in the concealment of the ownership and amount of income of the gambling houses. We have already described the opening of the Lawrence Avenue exchange by Brown in July 1938 in a bank building owned by Johnson (*supra*, pp. 29–30, 55–60). The Lawrence Avenue exchange was located a short distance from the Albany Park exchange. When Brown informed the owner of that exchange that he was going to open up the Lawrence Avenue

[24] The court's ruling on the sufficiency of the evidence against the aiders and abettors on the first four counts is closely related to its erroneous ruling on whether they were properly charged in the indictment. It erred in both instances in assuming that the essence of the crime was the filing of a false return, rather than the attempt to defeat and evade. Its error in this respect is more fully discussed in our original brief at p. 43 *et seq.*

exchange, the owner protested that there was not room enough for the two exchanges, but Brown told him that he had some outside business and would not interfere with the other exchange. (2 R. 478.) Brown had previously been a teller in a bank and had come to know Johnson and Hartigan there (3 R. 615, 616, 618–620).

Brown ostensibly opened and operated the exchange in partnership with Bernice Downey. All of the capital of the business was shown on the opening entries of the exchange business as being from Brown. About three months later the capital account was split and applied half to Brown and half to Miss Downey. During the first year the profits of the exchange were divided equally on the books. For 1939 the profits were divided two-thirds to Brown and one-third to Miss Downey. (2 R. 536.)

In testimony given by Brown to the grand jury in January of 1940 (2 R. 523–524, 527) he stated that he was out of work in 1938 and approached Hartigan with the idea of starting a currency exchange. Later Hartigan told Brown to go ahead with the exchange and that he, Hartigan, would invest some money and could direct some business to the exchange. Hartigan advanced some money but on the condition that his niece, Bernice Downey, work in the exchange to look after his interest. Brown had Miss Downey do clerical work and made her a partner on the exchange books. (3 R. 620–623, 664–666.)

The manner in which gambling checks were cashed at the Lawrence Avenue exchange has already been related (*supra*, pp. 55–60). Brown stated to the grand jury that after the exchange opened Hartigan introduced Sommers, Kelly, and Creighton to him and told them to bring their checks to him. They or their employees thereafter regularly brought in checks to be cashed and currency to be exchanged. In addition, Brown secured credit reports on various persons cashing checks at Hartigan's request. Brown stated that the gambling checks represented approximately sixty percent of his business at the exchange and that the rest of the business was business off the street. (3 R. 621–622, 648, 649–658.)

As has been shown, the gambling checks were credited by the exchange to an account entitled "Reserve for uncollected funds." Brown described this method of crediting gambling checks to the grand jury (3 R. 649–650, 653–654). In addition, Brown kept records showing whether individual gambling checks came from Sommers, Hartigan, Kelly, or Creighton (3 R. 653). At the time the bookkeeping system for the exchange was being set up, Brown told the accountant preparing the books that all of the entries in the uncollected funds account were from one source. At a later time Brown told the accountant that the source of the fund was Mr. Johnson (2 R. 535–536).

When Brown originally opened the exchange he deposited checks for collection in his account with the North Shore National Bank. This bank shortly thereafter asked him to take out his account because too many of the checks deposited were returned for insufficient funds. (3 R. 642–643.) Brown then found difficulty in establishing a banking connection for his exchange because of the opposition of a currency exchange association acting on the complaint of the Albany Park exchange which had lost the gambling business to Brown. To secure a banking connection Brown went to Goldstein, an attorney who had acted for Johnson in purchasing the building in which Brown's exchange was located. (2 R. 56–57.) Thereafter Brown was able to open and operate an account at the Central National Bank. Brown paid Goldstein no fee. (3 R. 642–647, 662–666.)

Brown closed the exchange on September 30, 1939. Brown's accountant and auditor on going to prepare the closing entries asked Brown why he was closing. Brown told the accountant that Miss Downey was thinking of getting married. He also said he had lost Mr. Johnson's account. The accountant pointed out that Brown had a large amount of other business but Brown said nothing to this and was apparently determined to close up. (2 R. 537.) Brown testified to the grand jury that he closed because business was slow and Hartigan's business was getting thinner. He

stated that Hartigan had told him they might close and that he, Brown, would not have any business. (3 R. 624–625.) Later on in his grand-jury testimony Brown admitted that Hartigan had told him there would be no more checks (3 R. 668–669).

As we have indicated, a few weeks after the exchange closed Miss Downey and her sister took the books of the exchange away from the building but on being called as witnesses each denied any knowledge of the whereabouts of the books and records (footnote 13, *supra*, pp. 55–56). Before the grand jury Brown testified that early in October, two or three days after the exchange closed, he destroyed the books and records by tearing them up and throwing them in the furnace at the exchange building where they were burned (3 R. 628, 640–642, 648, 649, 657, 673). The janitor at the exchange building who was there every day and who took care of the furnace, testified that he never saw Brown tearing up papers or the exchange records and that he saw no evidence of papers being burned in the furnace (3 R. 599). Brown produced before the grand jury cancelled money orders, a record of money orders issued, and a profit-and-loss statement for the exchange but produced no other records such as the record of checks cashed and correspondence (3 R. 638–641).

On November 1, 1939, a revenue agent, Clifford, talked over the telephone with a man who said

that he was Brown and that he operated the Lawrence Avenue Currency Exchange. The agent said he would like to examine the records of the exchange and was told that the records had already been destroyed. The agent asked whether he could nevertheless talk about the records and made an appointment for that afternoon. At the time of the appointment a man who said he was Brown called the agent and said he could not make the appointment but that he would be down the next morning. The next morning a woman who called the agent said she was Mrs. Brown and that Brown had gone out of town. (4 R. 8–9, 11–12.)

Before the grand jury Brown admitted that Clifford "made contact" with him in October of 1939 and that he left Chicago the afternoon of the day that Clifford called him (3 R. 629, 630–631). He described going rapidly from city to city outside of Chicago during the following week or week and a half (3 R. 631–634). When he returned to Chicago he stayed at his brother's home for a period of six or seven weeks (3 R. 634). Brown appeared before the federal authorities when a summons was left at his brother's house (3 R. 635–636).

Brown was convicted on the third and fourth counts involving the years 1938 and 1939. As shown above, the evidence against him was strong. He admitted to his accountant that the large account for "uncollected funds" was that of John-

son's gambling houses. His entire method of operation and elusive dealings with the revenue agent showed he was wilfully aiding in concealing the amount of the income of the gambling houses and Johnson's interest therein. There was more than ample evidence to sustain the judgment of conviction as to him.

B. EVIDENCE ON THE CONSPIRACY COUNT

All of the foregoing evidence in part A is applicable to the conspiracy count in the indictment.

The conspiracy charged was one to defraud the United States of Johnson's income taxes for the years 1936–1939. The indictment alleged that the conspiracy was a continuing one, beginning prior to January 1, 1936, and extending to the date of the filing of the indictment (March 29, 1940). The signing and filing of income-tax returns by Johnson, the operation of the Lawrence Avenue Currency Exchange by Brown and the cashing of checks at that exchange by Sommers, Hartigan, and Kelly were included in the overt acts alleged. (1 R. 2, 17–25.)

Taking the declarations and statements by the various respondents solely as to the declarant, the entire evidence established a concert of action by all of the respondents in operating the gambling houses and the Lawrence Avenue Currency Exchange in a manner to conceal Johnson's interest in and the income of the houses, in filing

incomplete and misleading income-tax returns and in making false statements to investigating revenue agents and the grand jury as to Johnson's interest in the houses. The concerted action must have been directed toward defrauding the Government of Johnson's income taxes and made plain the agreement of the parties toward this end. Cf. *Glasser* v. *United States*, 315 U. S. 60, 76–81. Substantial evidence of a conspiracy having been produced, the declarations of each respondent became chargeable against the co-conspirators. Overt acts charged were shown by uncontested evidence. The commission of but one overt act, in pursuance of the conspiracy, was sufficient to sustain the convictions. *Hyde* v. *United States*, 225 U. S. 347, 359. On all of the evidence, a jury question was clearly presented as to the conspiracy charge.[25]

II

In the Circumstances of This Cause Proof of Checks Cashed and Currency Exchanged Was Sufficient to Establish That Net Income Resulted From the Operations of the Gambling Houses

The Court's second question is whether in the circumstances of this cause proof of gross receipts

[25] Brown was properly convicted on the whole conspiracy in any event for his participation after 1938. *United States* v. *Manton*, 107 F. (2d) 834, 848 (C. C. A. 2d), certiorari denied, 309 U. S. 664; *Laska* v. *United States*, 82 F. (2d) 672 (C. C. A. 10th), certiorari denied, 298 U. S. 689.

is sufficient to establish that net income resulted from the operation of any enterprise in which respondent Johnson is alleged to have been interested. The Government has charged that Johnson was the owner of the principal gambling houses previously described.

At the very outset, it should be kept in mind that the maintenance of the gambling houses was illegal, and even if there had been no proof whatever of gross receipts the jury could reasonably have concluded that so extensive an illegal enterprise would not remain in operation for so long a period of time unless it were profitable, and indeed unless the net profits were commensurate with the risks involved. But the prosecution's case did not have to rest upon anything as general as that. With painstaking detail it undertook to show the profits of the enterprise through the check cashing and currency exchange transactions. And in Point I, A, 3, *supra*, pp. 52–64, we discussed that evidence, showing that it was amply sufficient to establish that the checks cashed and currency exchanged represented winnings or profits to the gambling houses. We shall now go further, in response to Question 2, and show that the evidence was sufficient to establish that the houses realized *net* profits.

It will be recalled that the major part of the currency received on the cashing of checks and the exchange of other currency was in the form of $100 bills (*supra*, pp. 53–60). This fact alone, when

considered in the setting of this case, lends strong support to the conclusion that the funds so received represented net income. The persistence with which the $100 denomination appeared indicated that it had special significance here. The houses maintained no bank accounts, and it was entirely reasonable to infer that the cashing of checks and exchanging of currency were simply the respondents' method of segregating the net profits of the houses from other money taken in at the gambling tables and used for current running expenses. The conversion of gambling receipts into currency of large denominations was the equivalent, under the respondents' practice of keeping no bank accounts, to bank deposits.[28] (Cf. 3 R. 938–939, 948.) And evidence as to bank deposits has universally been held sufficient to raise a jury question as to net income, particularly when such evidence is taken in conjunction with a showing of the probable source of such deposits. *Gleckman* v. *United States*, 80 F. (2d) 394 (C. C. A. 8th), certiorari denied, 297 U. S. 709; *United States* v. *Wexler*, 79 F. (2d) 526 (C. C. A. 2d), certiorari denied, 297 U. S. 703; *Malone* v. *United States*, 94 F. (2d) 281 (C. C. A. 7th), certiorari denied, 304 U. S. 562; *United States* v. *Miro*, 60 F. (2d) 58 (C. C. A. 2d); *Guzik* v. *United*

[28] Thus, as will be set forth in detail in Point III, *infra*, Johnson made many large personal expenditures of the type that would normally be made by check, but his expenditures were all in cash.

States, 54 F. (2d) 618 (C. C. A. 7th), certiorari denied, 285 U. S. 545; *Oliver* v. *United States*, 54 F. (2d) 48 (C. C. A. 7th), certiorari denied, 285 U. S. 543; *Orzechowski* v. *United States*, 37 F. (2d) 713 (C. C. A. 3d); *Emmick* v. *United States*, 298 Fed. 5 (C. C. A. 6th), certiorari denied, 266 U. S. 608.

Other evidence in the record strongly supports the conclusion that net income was represented by the check and currency exchange transactions. Losses to customers at the gambling houses were paid immediately upon the conclusion of the particular bet or if the gambling was by gambling checks at the conclusion of the customers' play. (2 R. 181–182, 299–300, 355, 465–466; 3 R. 572, 788, 792, 795, 826–827.) Horse-race betting was done in the afternoon and concluded early in the evening; other forms of betting began in the afternoon and carried on through the evening and early morning (2 R. 130, 187–188, 228, 249–250, 257, 304, 311, 389, 392, 405; 3 R. 550, 570, 810, 885). The respondents cashed checks and exchanged currency in the daytime during regular business and banking hours (2 R. 494, 495; 3 R. 554, 557, 560, 588, 595–597). The amounts involved in these transactions, therefore, represented the balance of the preceding day's business *after the payment of the house's gambling losses*. Moreover, the limitation on the size of individual bets at the houses and the known odds in favor of the house at the various forms of gambling (2 R. 349; 3 R. 802, 845, 846) made it

highly improbable that the house's gambling losses for any particular day would exceed its winnings.

Similarly, the record reveals that the most prominent single item of expense in the operation of the gambling houses, the employees' wages, was met daily prior to the close of business for the day (2 R. 237, 243, 255, 278, 322, 328, 336, 347, 348, 350, 352, 355, 359, 384, 387–388, 389, 391–392, 398, 462; 3 R. 787, 885–886). As with the losses, therefore, the checks cashed and currency exchanged on the following day were a net balance of receipts *after* the payment of wages. Cf. *United States* v. *Miro, supra; Orzechowski* v. *United States, supra.* The individual daily wage scale at all of the houses ranged from $4 to $15 (2 R. 130, 132, 222, 225, 227, 238, 250, 255, 297, 328, 334–335, 348, 350, 352, 386, 389, 462–463; 3 R. 787–788). Obviously the large denominations received on the cashing of checks would not subsequently have been used for payroll purposes.

Although the record does not directly indicate that other operative expenses were met in a manner whereby their payment necessarily preceded the segregation of the day's gambling receipts through the currency exchange transactions, the inference is plain that at least some payment of other expenses in this manner must have taken place (2 R. 267–269, 306, 308; 3 R. 732–733; cf. 3 R. 885–886). Irrespective of this, however, in proportion to the amounts of the receipts of the houses the expenses of operation, other than gambling losses and

wages, could only be small and could not affect the guilt or innocence of the respondents. See *United States* v. *Ragen*, 314 U. S. 513, 524–526. The record reveals the soundness of this inference.

The demonstrable or possible amounts of operating expenses at the houses must be compared with the established total income of the houses. For 1936 the total income was $485,294.57, for 1937 $852,890.56, for 1938 $850,994.20 and for 1939 $926,499.30 (*supra*, pp. 52–53). The largest potential expense, other than losses and wages, might be for "protection" payments. Sommers, Hartigan and Kelly, however, each denied that he had ever made such payments (2 R. 459, 466, 471). Furthermore, protection payments would not be deductible. *Maddas* v. *Commissioner*, 40 B. T. A. 572, affirmed on other grounds, 114 F. (2d) 548 (C. C. A. 3rd). The result follows *a fortiori* from *Textile Mills Corp* v. *Commissioner*, 314 U. S. 326, 337–339.

The second largest additional potential expense would be payments to the other respondents, which under the Government's theory of the case were salary or percentages of the profits paid the respondents in lieu of salary. These payments may be taken to be the amounts reported by the respondents Sommers, Hartigan, Fianagan and Kelly as gambling income. For 1936 these amounts totalled $36,005, for 1937 $48,167.38, for 1938 $35,725 and for 1939 $42,467 (*supra*, pp. 71–72).

Amounts spent for improvements at the houses (2 R. 142, 235–240; 3 R. 892) and gambling equipment such as gambling tables, roulette wheels, slot machines, etc. (see 3 R. 885) would be capital expenditures and not deductible. Expenses for currently used gambling supplies, hand book sheets, cashiers' sheets, dice and the like, even if deductible, would not be large. (Cf. Govt. Exs. O–212A to O–218S; Deft. Exs. S–12, S–13, S–14, S–15, S–16A, S–16B.)

The evidence for the Government does not directly disclose the rental paid for the gambling rooms other than the D & D Club. Kelly "rented" this space from Johnson in September 1936. His rental throughout his occupancy was $450 per month. In 1937 Kelly was $1,800 in arrears on the rent. Johnson waived the arrearages on Kelly's paying $100. In December of 1939 Kelly was again in arrears in an amount of $3,150. No action was taken by Johnson to collect this. (2 R. 14–18; see also 3 R. 878.) In his statement to the revenue agents Sommers stated that he paid rent of $250 monthly for the Dev-Lin and $200 for the Horseshoe gambling room (2 R. 469). The defense introduced testimony to the effect that Sommers paid $200 monthly for the gambling room at the Horseshoe throughout the period 1936–1939 (3 R. 782–783) and $250 monthly for the Dev-Lin from May 1, 1936 (3 R. 784; see also 3 R. 809). Similar testimony was

given that Hartigan paid $200 monthly for the Harlem Stables from August 1936 until August 1939, and $250 monthly during the balance of 1939 (3 R. 804–805). The defendant Wait testified that the rent at the Lincoln Tavern was around $5,000 a year. (3 R. 906–907.) Flanagan testified that he paid $50 a month for the clearing house at each of its locations (3 R. 932, 946) and that he paid Johnson $250 monthly for the 4020 Ogden Club and $250 for the 2141 South Pulaski [27] (3 R. 942). The maximum total rents paid for the houses, therefore, was $18,800 in 1936, $23,100 in 1937, $24,000 in 1938, and $20,900 in 1939.

A witness for the Government testified that Flanagan's account with the Nationwide News for horse racing service totalled about $400 a week (2 R. 157). Flanagan stated that his payments varied from $75 to $260 weekly (3 R. 937). Taking the maximum amount, the annual expense for horse racing service was $20,800. Bus service to the clubs cost approximately $20,550 in 1936, $20,213 in 1937 and $420 in 1939 (2 R. 307–308). The check-cashing charge of the currency exchanges at the rate of twenty-five cents a hundred (2 R. 459, 468, 476) would have totalled $638.54 in 1936, $1,559.23 in 1937, $1,475.48 in

[27] The rental paid to Johnson, if paid, was a further act of concealment of Johnson's ownership of the houses under the Government's charge and would not be deductible. However, since Johnson regularly reported rents from these properties they are included in this comparison of expenses.

1938, and $2,216.25 in 1939 (*supra*, pp. 52–53). No charge was made for exchanging currency at the Albany Park Currency Exchange (2 R. 491).

With several minor exceptions mentioned in footnote 28, *infra*, the foregoing items appears to constitute all of the probable expenses in the operation of the houses. Many of them are probably not deductible from gross income in view of the illegal character of the enterprise, and it is possible that all of them were paid out of the till before the profits were taken out. But even if all were deductible, and even if they were paid subsequent to the segregation of the profits, a reasonable estimate shows that in the aggregate they were far less than the profits shown to have been derived in each of the years in question. Thus, the yearly totals of these expenses, excluding gambling losses and wages which were shown to have been taken out before the profits were segregated,[28] were as follows: $96,793.54 for 1936, $113,839.61 for 1937, $82,800.48 for 1938, and $86,803.25 for 1939. But the profits shown to have been received during each of the years (*supra*,

[28] Also excluded from these totals are the moving and storage expenses (Govt. Exs. 0–128–0–182, 0–191–0–201; 2 R. 265–270, 272–273); utility bills for gas, light, etc. (cf. Deft. Exs. S–17A, S–17B, S–24, S–25, S–26, S–27); and telephone charges (cf. Deft. Exs. S–21, S–22, S–23). The record does not show the amounts of these charges, but the jury could reasonably conclude that they were within normal limits, and that even when added to the expenses summarized above, the amount of net income remaining would be vastly in excess of all the expenses.

pp. 52–53, 66), ranged from about four to ten times these amounts. And even after subtracting these amounts plus estimated amounts for the items mentioned in footnote 28, the remaining net income would be well over $300,000 for 1936, and would conservatively run from $650,000 to $750,000 a year for the other three years.

III

The Record Furnishes Proof That During at Least Each of the Years 1937, 1938, and 1939 Johnson's Expenditures Exceeded Reported Income and Were Made in Part From His Unreported Income Received in Each of Those Years

The Court's third and fourth questions are whether Johnson's sentence on the first four counts, if it is to be sustained on the "expenditure theory," must be supported by proof that during some one of the four years involved his expenditures exceeded reported income and were made in part from his unreported income received in that particular year; and, if so, whether the record furnishes such proof. Both questions may be answered in the affirmative. We shall here undertake to show that during each of at least the last three of the four years involved, Johnson's cash expenditures exceeded reported income and were made in part from unreported income received in each of those three years, respectively.

The indictment charged Johnson with attempt to defeat and evade his income taxes, and the principal question was whether he actually received more taxable income than he reported. We have attempted to show in Points I and II, *supra*, that Johnson owned a number of gambling houses; that the income therefrom may reasonably be attributed to him; and that such income was in excess of his reported income. But there is no single exclusive method of proving the receipt of unreported income. Any circumstances from which the jury could reasonably be convinced that the defendant has received unreported income are sufficient. And the fact that a taxpayer has made large cash expenditures during any year in question which exceed all his known cash resources plus his reported income may give rise to the inference that he has in fact received more income than he has reported—i. e., that the expenditures were made in part from unreported income. This is in essence the "expenditure theory," and it has been approved as a method of proof of tax evasion. *United States* v. *Skidmore*, 123 F. (2d) 604 (C. C. A. 7th), certiorari denied, 315 U. S. 800. Whether the inference is strong or weak depends entirely upon the facts of the particular case. The inference is especially strong here, since the expenditures were far in excess of all of his known cash resources plus reported income during each of the last three years, and the jury was therefore fully

warranted in concluding that those expenditures were made in part from unreported income received during each of those three years, respectively. Moreover, the fact that Johnson was shown to have had an interest in the gambling houses reinforced the conclusion that the excess constituted unreported income, for it explained the source of those large expenditures.

In summary as to this aspect of the case, the Government proved from Johnson's own admissions that his cash resources at the beginning of 1932 were $78,000; to that amount it added his receipts for the years 1932–1936, inclusive, and subtracted his expenditures during those years. His cash balance at the beginning of 1937 was thus shown to be $202,919.89. His expenditures for 1937, however, were $555,236.55, or more than $82,000 in excess of his reported income for 1937 plus his cash balance on hand at the beginning of the year. Similarly, for 1938, his proven expenditures exceeded his reported income by $357,079.98; and for 1939, his proven expenditures exceeded his reported income by $150,580.05. The mathematical computations, with appropriate record references, are set out in full on the chart inserted at the end of this brief. Thus, since the record shows that Johnson had an interest in the gambling houses entitling him to income therefrom, and since the houses were shown to have been en-

gaged in operations of considerable magnitude which were productive of large profits, there was a strong inference that the expenditures made by Johnson in the years 1937, 1938, and 1939 were made in part from unreported income received by him during each of those years by reason of his interest in the gambling houses. Cf. *Gleckman* v. *United States,* 80 F. (2d) 394 (C. C. A. 8th), certiorari denied, 297 U. S. 709.

Johnson admitted to revenue agents that his income was from gambling (2 R. 410–411), and all of the expenditures charged to Johnson were made in cash (see e. g., 2 R. 55–62; 3 R. 979); no exchanges of property for other property or services are involved. The principal initial problem, therefore, is as to Johnson's available cash balances during the years 1937, 1938, and 1939. Any non-cash assets, such as real estate which Johnson may have owned during the period in question are not material, unless there is reason to believe that they were converted into cash and thus became available as an additional source of Johnson's expenditures. Johnson himself described the status of all of the non-cash assets known or claimed to have been owned by him (3 R. 949–950, 955–961, 970–971, 972–973, 976–979, 981–983, 990), and he also testified that he used his bank account only for the payment of taxes (3 R. 978).

If there were any likelihood that Johnson had converted any of his other assets into cash as a

possible source for his expenditures, it would have been revealed in the record. For, the sale of such assets would undoubtedly have resulted in some gain or loss which would have been reflected as capital gain or loss on his income tax returns. The returns were before the jury, and it was entitled to infer that no such sales had occurred; a sale at precisely cost is not common, and the probability that sales of a number of assets were all at cost is exceedingly small. Similarly, if he had owned any substantial blocks of securities, that fact would undoubtedly have been reflected in his returns by the reporting of dividends, interest, etc. Again, the ownership and sale of real estate would be indicated by deductions for real estate taxes, etc., and by the termination of such deductions. From 1932 through 1939 Johnson reported no capital gains or losses and no dividends, and his returns show no diminution in claimed deductions for depreciation and real estate taxes, except as to 1939, in which year Johnson gave an apartment building to his brother (3 R. 977; Govt. Exs. R–6—R–13). Johnson's statement to revenue agents in 1939 and his testimony as to his assets on December 31, 1939, indicate that he invested primarily in real property and to a small extent in mortgages and bonds (2 R. 411–412, 417; 3 R. 976–978).

The existence of loans outstanding to Johnson in 1932 would be revealed by interest reported on

the returns. Large noninterest bearing loans would be unusual transactions. Johnson reported interest in 1932 of $1,380. The repayment of the principal of an amount of loans indicated by this amount of interest would not materially affect the outcome of the Government's computation. The making and repayment of loans between 1932 and 1939 would be indicated by a rise and fall in interest reported during the period. The amount of interest, however, reported by Johnson during this period remained relatively constant (Govt. Exs. R–6—R–13). In testifying at the trial Johnson claimed the receipt of payments on loans outstanding in 1932 (3 R. 959–960). Effect has been given to this claim in the attached computation.

Although Johnson might conceivably have received large gifts in cash, he never at any time so contended, and the very magnitude of the amounts involved would justify the jury in concluding that they were not reasonably to be explained as gifts. In these circumstances the Government has met its burden of proof by showing a definite source of income and the making of cash expenditures in excess of reported income plus known cash resources. Decisions in analogous cases indicate that the Government is not compelled to go further and establish specifically that no gifts had been received. Cf. *Rossi* v. *United States*, 289 U. S. 89; *Crapo* v. *United States*, 100 F. (2d) 996 (C. C. A. 10th); *Sauvain*

v. *United States*, 31 F. (2d) 732 (C. C. A. 8th); *Edwards* v. *United States*, 312 U. S. 473, 482–483; *McKelvey* v. *United States*, 260 U. S. 353; *United States* v. *Cook*, 17 Wall. 168; 2 Chamberlayne, Modern Law of Evidence (1911), Secs. 978–984; IX Wigmore on Evidence (3d ed., 1940), Secs. 2486 (especially fn. 3) and 2512 (d). Information as to the existence of unknown or secret gifts is peculiarly within the knowledge and control of the defendant and may easily be presented by him. To prevail on this ground the defendant should be required at least to put in issue the receipt of specific gifts and thereby permit the Government to assume its full burden of proof of establishing the defendant's guilt in the face of the defendant's specific claim. These respondents have at no time contended that Johnson received cash gifts or bequests during the period of time in question.[29]

The complete computation of the Government including the individual items of income, cash receipts, and expenditures with supporting record citations, as set forth in the attached chart, discloses that Johnson made cash expenditures of more than $600,000 in excess of his available cash

[29] These considerations are equally applicable to the problem of the Government's negativing the existence of cash received by Johnson from undisclosed sales of assets or repayments of loans. Johnson made no claim of his receipt of cash other than as income except as to the repayment of the principal of certain mortgages and a Joint Stock Land Bank bond (3 R. 959–960).

resources plus reported income for the three years 1937–1939, inclusive. A number of the items involved in this computation were not contested at the trial (cf. 3 R. 991-995 with 4 R. 18–26, 35–36, 41–45, 46–52), and most of the amounts involved in the disputed items were not in issue. (See 3 R. 992–993.) Johnson, however, did contest the use of the $78,000 figure as his cash balance as of the beginning of 1932, and he contended also that certain expenditures, principally for real estate or improvements on real estate, were not chargeable to him because he had no interest or only a partial interest in the property involved. A summary of the evidence on the disputed items follows:

Johnson's cash balance, December 31, 1931.— The initial premise of the Government's contention as to Johnson's expenditures is that Johnson's cash balance on December 31, 1931, was $78,000. The Government's position is based upon admissions of Johnson himself to Revenue Agent Wilson on January 26, 1940. The revenue agent testified as follows (2 R. 10):

> I asked him [Johnson] how much he had on December 31, 1931. He said he had his bank roll of $10,000.00 and $68,000.00 in accumulated gambling profits in the safety deposit box. He said that all the money in the box was gambling profits. He kept all his gambling profits in his box; not in his bank, he told me. He said it was in the form of currency. We discussed several adjustments made on examination

> of his income tax return for 1931, particularly in relation to currency, and he told me at that time what he had on December 31, 1931.

Defense counsel simply moved to strike this testimony, *but did not cross-examine the witness* (2 R. 11). Johnson testified that he recalled the conversation with Revenue Agent Wilson but that the conversation related to an item of $78,000 on his 1931 return, that he told Wilson it was from gambling, that Wilson asked him what he did with the money and he said he kept $10,000 in his pocket and the rest in the box, that he did not tell Wilson that the $68,000 was the only cash he had in the box at that time and that he had between $140,000 and $150,000 in the box besides the other (3 R. 960). There was thus raised a sharp issue of credibility which the jury could resolve for itself.

Lincoln Park Building.—Prior to 1932 Johnson had been one of several joint owners of the equity in the Lincoln Park Building, the business building which housed the D & D Club. Another joint owner, who also later acted as the agent for the building, testified that in the latter part of 1933 Johnson purchased the other interests in the equity in the building for $16,000 and that Johnson made the payment to him. The witness likewise testified that Johnson had acquired some of the second mortgage notes in 1932 and 1933 and that he purchased the balance of the second mortgage notes in 1933 for $32,000, paying this sum to the witness.

(2 R. 12–13, 15.) Johnson testified that he paid only $7,500 for the interests of the other equity owners and $22,000 for the outstanding mortgage notes he did not then own (3 R. 956–957).

Albany Park Bank Building.—Goldstein, an attorney, testified that he purchased this building on July 16, 1937, at the request of Johnson, that he received the amounts of the original deposit and final payment in currency from Johnson, that title to the property was taken in the name of his son, and that a quitclaim deed subsequently was delivered to Johnson by his son (2 R. 56–57). The Lawrence Avenue Currency Exchange, operated by the respondent Brown, was located in this building after July 1938 (3 R. 587). Goldstein's testimony was corroborated by the testimony of two employees at the building who stated that Goldstein reemployed them and became the spokesman for the building in July 1937 (3 R. 587, 590, 595, 599).

Johnson testified that he did not own any part of the Albany Park building, that he never employed Goldstein to purchase the property or gave him money to make the purchase and that no deed was delivered by Goldstein to him (3 R. 955). Johnson's testimony, however, must be weighed in the light of the fact that in the opening statement his attorney said that Johnson owned the building and accurately described its operation (2 R. 3–4).

9730 South Western Avenue.—Goldstein testified that he purchased the real estate comprising this property, a number of vacant lots, in 1937, that he purchased the various lots at Johnson's request and received the amounts of the payments from Johnson in currency, that title to the parcels was variously taken in the names of his law partner or his secretary and that subsequently quitclaim deeds were delivered to Johnson (2 R. 55–56). On cross-examination Goldstein stated that a deed for one-half of the property was made to William R. Skidmore, but he denied that Skidmore had given him the money to make the purchase (2 R. 63–66).

A building was constructed on the property in 1937. The supervising architect, Nadherny, who was called as the court's witness, testified that he was working for Skidmore when Skidmore told him he had a friend [Johnson] who wanted to put up a building. Johnson explained to the architect the type of building desired and ordered the preparation of plans. Nadherny stated that he received the money which he paid out for the construction of the building in part from Skidmore and in part from Johnson but said that he felt the payments were being made by Skidmore in Johnson's behalf, "like a agency". (2 R. 74, 75, 79, 83–84, 85, 88–89.)

Two revenue agents related a conversation which they had with Johnson in November of 1939. Both

stated that Johnson told them he was the owner of 9730 South Western Avenue. (2 R. 117–118; 4 R. 8.) One testified that Johnson said nothing as to whether Skidmore had an interest in the property although he had asked him (2 R. 118). In a formal statement given by Johnson on March 27, 1939, and introduced in evidence, Johnson stated that he had had no business transactions with Skidmore, except a loan he had made to Skidmore (2 R. 411).

Johnson testified that he owned one-half of the property at 9730 South Western Avenue and that he had contributed to the purchase of the land and building of the improvement. He denied that he ever told the agents he was the sole owner and stated he told them he was the part owner (3 R. 955, 959). On cross examination Johnson stated that he bought the property at Skidmore's suggestion and paid one-half of the purchase price to Skidmore and that the two of them decided to build the building and he paid one-half of the cost (3 R. 973–975).

Bon-Air Country Club and adjacent properties.—In its final form this property included an original country club and a number of adjoining properties (3 R. 956). Goldstein testified that he made the purchase of these various properties at Johnson's request, that he received the money for the purchase payments from Johnson in currency, that he took title to the properties

in the names of nominees and that quit-claim deeds were subsequently delivered to Johnson (2 R. 57–59). Johnson admitted that the record title to Bon-Air was in his name (3 R. 963–964). An officer of the bank which sold the country club property testified that he negotiated the sale with Goldstein and received payment from him. The witness said that he met no principal other than Goldstein and that he had no contact or dealings with any other person than Goldstein (3 R. 574–575).

The country club property was operated as a night club during 1938 and 1939 by a corporation known as the Bon-Air Catering Company, Inc. (2 R. 48; 3 R. 897, 956). Fifty-four shares of the corporation's capital stock were registered in the name of and held by Johnson, twenty-four shares by the defendant Wait, twenty shares by the respondent Hartigan, and one share each by two employees [9] (2 R. 55; 3 R. 775, 912, 964). An accountant employed by the accounting firm which prepared and audited the corporation books testified that in the fall of 1939 he asked Johnson for details as to the payment of the various amounts of stock and that Johnson instructed him to charge all of the amount to his (Johnson's) account. This entry was made by the

[9] Some time after the formation of the company one of the employees died, and his share was transferred to Johnson, thereby increasing Johnson's holdings to fifty-five shares (3 R. 912, 956, 964).

accountant in the corporation's books. (3 R. 775–776.)

Large expenditures for improvements on the Bon-Air property during 1938 and some in 1939 were entered as assets on the Catering Company's books. These amounts were variously credited to Johnson, Wait, one Geary and Roy Love. An accountant for the auditing company stated that he discussed these charges with Johnson in 1939 and that Johnson told him that all of these items had been advanced by him and should be credited to him rather than scattered among the four accounts. The accountant was likewise instructed by Johnson that these should never have been on the corporation's books and should be taken off. Accordingly, he took the asset accounts off the corporation books and merged the small credit remaining in Johnson's account. (2 R. 53–54.)

Reference has already been made to Johnson's conversation with revenue agents in November 1939 (*supra*, pp. 101–102). At that time Johnson told the agents that he owned the Bon-Air Country Club and no mention was made that Skidmore had any interest in the property (2 R. 117–118; 4 R. 8). It will also be recalled that in Johnson's statement of March 1939, he said that he had had no business transactions with Skidmore (2 R. 411).

Johnson testified that he owned one-half of the Bon-Air properties and that Skidmore owned the

other half. He denied that he had anything to do with the negotiations for the purchase of the property and that he ever gave Goldstein money to pay for the property. He stated that Skidmore purchased the property, that he, Johnson, later contributed his one-half of the price and that each of them thereafter contributed equally to the expenditures for improvements and operations. (3 R. 955–957, 961–965, 967–970, 979, 982, 983–984.) Johnson denied that he had told the revenue agents he was the sole owner of Bon-Air and said that he told them he was part owner (3 R. 959, 963). He explained his statement about never having business transactions with Skidmore by saying that the conversation related to gambling and that he thought the question asked related to gambling transactions (3 R. 963).

The defendant Wait gave similar testimony as to the ownership of Bon-Air (3 R. 896–898, 900, 910–913). The defense likewise introduced other evidence for the purpose of proving an interest of Skidmore in Bon-Air. This consisted of testimony as to Skidmore's doing acts in relation to the improvement and operation of the club, such as the payment of money, of Skidmore's frequently being at the club, of the accounts of two companies relating to Bon-Air being in Skidmore's name or the name of his junk business, of Skidmore's coat of arms being hung in the club, and of circumstantial evidence to connect Skid-

more with the construction and operation of the property. (3 R. 893–895, 916, 916–917, 919–920, 922–923, 923, 923–924, 925–926, 928, 928–930.) One witness, not a real-estate dealer, likewise testified that he carried on preliminary negotiations with the selling bank for Skidmore for the purchase of Bon-Air (3 R. 914–916). It will be recalled that the bank officer stated he dealt only with Goldstein (3 R. 575).

The amounts of the expenditures for improvements at Bon-Air in 1938 were shown by the books of the Catering Company (Govt. Exs. E–46–E–53). Expenditures for 1939 were not entered in the corporation books but on separate accounts as to the underlying ownership of the land. Johnson stated that he was unable to produce these records (3 R. 964–965). Accordingly, the Government introduced at length testimony of suppliers as to work or supplies furnished Bon-Air in 1939.[31] (2 R. 89-91, 92–93, 119–128, 140–141, 142, 143, 144, 145–148, 168–169, 170–173, 228–229, 229–230, 230–232, 232–233, 258–259, 259–260, 260–261, 261, 274–276, 308, 312–315, 392–395). In testifying, however, Johnson stated that he advanced only half of the money expended on improvements and opera-

[31] The total expenditures made by Johnson in 1939 for improvements on Bon-Air, as shown by this evidence, were $228,195.07 (4 R. 49). The Government's proof, therefore, established as Johnson's total expenditures for Bon-Air prior to 1940 the sum of $660,992.73 (4 R. 49).

tion of Bon-Air and that his net advances (including a credit of about $11,000) up to the end of 1939 totalled $365,000 (3 R. 957, 992). Accordingly, the Government, upon the assumption that Johnson was the full owner rather than half owner, has used the amount of $730,000 minus a certain credit of $22,355 (3 R. 992) as the total of expenditures on Bon-Air and has applied to 1939 the balance of this total not reflected in the Catering Company's books for 1938.

The Dells.—As with the other properties Goldstein testified that he purchased the two parcels comprising this property at the request of Johnson, that he received the purchase money from Johnson in currency and that he delivered quitclaim deeds to the property to Johnson (2 R. 59, 66–67).

Johnson testified that he owned only a one-half interest in the Dells property and that he paid Skidmore for that one-half interest. He denied that he had made any arrangements with Goldstein for its purchase (3 R. 955, 970–971). An attorney, testifying for the defense, stated that he represented the sellers of the Dells and carried on negotiations with Goldstein for the sale. He said that he talked to Skidmore about the purchase, and obtained Skidmore's approval as to the price. He further said that he never saw Johnson in connection with the transaction. He admitted that

Goldstein paid him the purchase money at later dates. (3 R. 926–927.)

Columbian Gardens real estate.—Goldstein testified that at the request of Johnson he entered into an escrow agreement as to one of these properties and deposited $10,000. He likewise made a deposit of $7,500 on adjoining property at Johnson's request. He stated that he received the currency from Johnson. (2 R. 60–61; see also 3 R. 575–576; Govt. Ex. E–39.)

Johnson stated that he did not furnish Goldstein with the money for these deposits and knew nothing of the transactions (3 R. 957).

Miscellaneous items.—Johnson's statement of March 1939 in the course of an examination of his 1937 income tax return disclosed that he had loaned Skidmore $37,000 (2 R. 411). This loan has been included as an expenditure of Johnson's in 1937. At the trial Johnson testified that the loan was made in 1939 and repaid in the same year (3 R. 957, 984).

An accountant, who testified as an expert witness for the defense, stated that his examination of capital expenditures at Johnson's farm resulted in a total amount of $4,310.75 less than the Government accountant's total through some unlocated difference. Accordingly, the defense computation is reduced by this amount (3 R. 993).

Johnson admitted making expenditures for the purchase of Liberty Bonds and payments of the mortgages on 4020 Ogden Avenue and 2141 Pulaski Road (3 R. 972–973, 976–977). The expert accountant for the defense identified these as to year and amount and from an examination of all the record added amounts of interest and additional expenditures on Johnson's farm (3 R. 992–993). Johnson likewise claimed the receipt of payments of principal on two mortgages and a Joint Stock Land Bank bond (3 R. 959–960, 970, 993). All of these items, including Johnson's uncorroborated claim of the receipt of additional cash, have been reflected in the Government computation.

Johnson testified that his living expenses were around $10,000 a year (3 R. 978). This amount has been used in the attached computation. Johnson likewise testified that he had about $50,000 in cash on December 31, 1939 (3 R. 976).

The conflict of evidence as to the disputed items thus reduces in the main to a question of the truthfulness of conflicting testimony and in part to the meaning of conflicting testimony and the weight of opposing evidence. The major part of the defense to the Government's expenditure theory rests on the testimony of Johnson himself. Clearly, therefore, Johnson was not entitled to a directed verdict in these circumstances.

CONCLUSION

The judgments of the Circuit Court of Appeals should be reversed and the judgments of the District Court affirmed.

Respectfully submitted.

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SEPTEMBER 1942.

WILLIAM R. JOHNSON

Statement of receipts and expenditures

Record Citations	1932		1933		1934		1935		1936	
	Cash receipts	Expenditures	Cash receipts	Expenditures	Cash receipts	Expenditures	Cash receipts	Expenditures	Cash receipts	Expenditures
Balance Forward	[1]$78,000.00		$127,410.17		$134,215.93		$175,547.93		$116,837.78	
Items of Cash receipts										
Per Income Tax Returns (Govt. Exs. R-6—R-13)	70,677.54		74,667.81		116,214.53		57,878.88		161,832.74	
Additional (4 R. 47)	415.56		2,097.13		16,129.36		605.39		1,132.70	
Depreciation Allowed (Govt. Exs. R-6—R-13)	3,067.41		3,067.41		9,007.35		9,942.68		10,410.77	
Investments Recovered (3 R. 959-960, 970, 993, Govt. Ex. R-6)	289.45		2,083.51		4,015.91		5,076.18		7,466.37	
Items of Expenditure										
Income Taxes Paid (Govt. Exs. R-90—R-104)		88,841.11		88,610.10		827,993.00		$11,372.56		$20,062.18
Payment of Mortgage—2141 So. Crawford Ave. (3 R. 972, 992)				5,000.00						
" —4020 Ogden Ave. (3 R. 972, 992)		500.00		8,500.00						
Purchase of Liberty Bonds (3 R. 976-977, 993)				5,000.00						
Lincoln Park Bldg.:										
Purchase of Equity (2 R. 12)						16,000.00				
Payment of 2nd Mtge. (2 R. 13, 15; Govt. Ex. E-9)		4,750.00		38,000.00						
Payment of 1st Mtge. (2 R. 36; Govt. Ex. E-12)						25,000.00		75,000.00		50,000.00
Delinquent Taxes (2 R. 430)						15,205.48				
Improvements (Govt. Exs. R-8—R-13, E-16—E-20)						6,030.05		2,059.91		4,398.72
Furnishings (Govt. Exs. R-8—R-13, E-16—E-20)						3,076.40		3,453.84		235.57
Thorndale-Glenwood—Furnishings (Govt. Exs. R-8—R-13, E-21—E-25)						730.22		326.00		124.00
Albany Park Bank Bldg.—Purchase of (2 R. 3-4, 57)										
9730 So. Western Ave.:										
Purchase of land (2 R. 55-56, 118; 4 R. 8; Govt. Exs. E-27—E-30)										
Buildings (2 R. 75, 79, 83-84, 88-89, 117-118; 4 R. 8)										
Sunny Acres Farm:										
Purchase of (2 R. 60; 3 R. 982; Govt. Ex. E-31)										
Capital Items and Expenditures (3 R. 993, 4 R. 5-6, 10)										
Personal (3 R. 993; 4 R. 5-6, 10)										
Bon Air Catering Co.:										
Purchase of Property (2 R. 57-58; Govt. Exs. E-32—E-34)										
Improvements (2 R. 51, 54, 118; 3 R. 957, 983, 992; Govt. Exs. E-46—E-53)										
Curran Farm—Purchase of (2 R. 58-59; Govt. Exs. E-37, E-38)										
Columbian Gardens Real Estate—Deposit of Currency (2 R. 60-61; 3 R. 575-576; Govt. Ex. E-39)										
Du Page County Real Estate—Purchase of (2 R. 60, 3 R. 594, 982; Govt. Ex. E-41)										
The Dells—Purchase of (2 R. 59, 66-67, 3 R. 955, 992-993; Govt. Exs. E-35, E-36)										
Loan to Wm. R. Skidmore (2 R. 111)										10,000.00
Interest Paid (3 R. 993)		117.56								
Living Expenses (3 R. 978)		10,000.00		10,000.00		10,000.00		10,000.00		10,000.00
Balance on Hand (3 R. 976) 12-31-1939										
Balance Forward		24,208.67		75,110.10		104,035.15		132,213.28		94,830.47
		127,419.17		134,215.93		175,547.93		116,837.78		202,918.89
Totals	151,618.84	151,618.84	209,326.03	209,326.03	279,583.08	279,583.08	249,051.06	249,051.06	297,749.25	297,749.25

[1] Stated Cash on hand Jan. 1, 1932 (2 R. 10).

[2] Stated Cash on hand Dec. 31, 1939 (3 R. 976).

WILLIAM R. JOHNSON

Statement of receipts and expenditures

1934		1935		1936		1937		1938		1939		Grand total		
pts	Expenditures	Cash receipts	Expenditures	Cash receipts	Expenditures	Cash receipts	Expenditures	Cash receipts	Expenditures	Cash receipts	Expenditures			
93		$175,547.93		$116,837.78		$202,919.89						$78,000.00		
53		57,878.88		161,892.74		248,660.18		$101,946.68		$21,715.47		1,083,653.83		
36		605.39		1,132.70								19,549.02		
35		9,942.68		10,410.77		15,354.95		19,028.47		17,170.51		87,049.55		
91		5,076.18		7,466.37		5,573.71		10,506.10		1,178.22		36,189.45		
	$27,993.00		$41,373.56		$20,062.18		$78,550.70		$128,399.72		$31,530.94		$348,361.31	
													5,000.00	
													9,000.00	
													5,000.00	
	16,000.00												16,000.00	
	25,000.00		75,000.00		50,000.00								42,750.00	
	15,205.48												150,000.00	
	6,030.05		2,059.91		4,398.72		16,274.00		3,680.09		266.08		15,205.48	
	3,076.40		3,453.81		235.57						2,090.19		32,708.85	
	730.22		326.00		124.00		102.75		106.00				8,855.97	
							59,887.05						1,388.97	
													59,887.05	
							13,115.00						13,115.00	
							22,400.00						22,400.00	
							145,000.00						145,000.00	
							102,223.00		12,375.27		12,964.56		127,562.83	
							3,238.14		3,002.49		4,645.14		10,885.77	
							75,000.00		20,056.73				95,056.73	
									273,940.93		274,847.34		548,788.27	
											63,800.00		63,800.00	
											17,500.00		17,500.00	
							16,050.00						16,050.00	
					10,000.00		12,115.90						22,115.90	
									37,000.00				37,000.00	
							1,280.02						1,397.58	
	10,000.00		10,000.00		10,300.00		10,000.00		10,000.00		10,000.00		80,000.00	
														[1]850,000.00
	104,035.15		132,213.28		94,820.47		555,236.56		488,561.23		420,644.25		1,894,829.71	50,000.00
	175,547.93		116,837.78		202,919.89		[1]82,727.88		357,079.98		150,280.03		590,387.86	50,000.00
08	279,583.08	249,051.06	249,051.06	297,740.36	297,740.36	472,508.73	472,508.73	131,481.25	131,481.25	270,064.20	270,064.20	1,304,441.85	1,304,441.85	

on hand Dec. 31, 1939 (3 R. 976).

[1] Red figures represent excess of expenditures over cash receipts and other cash

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